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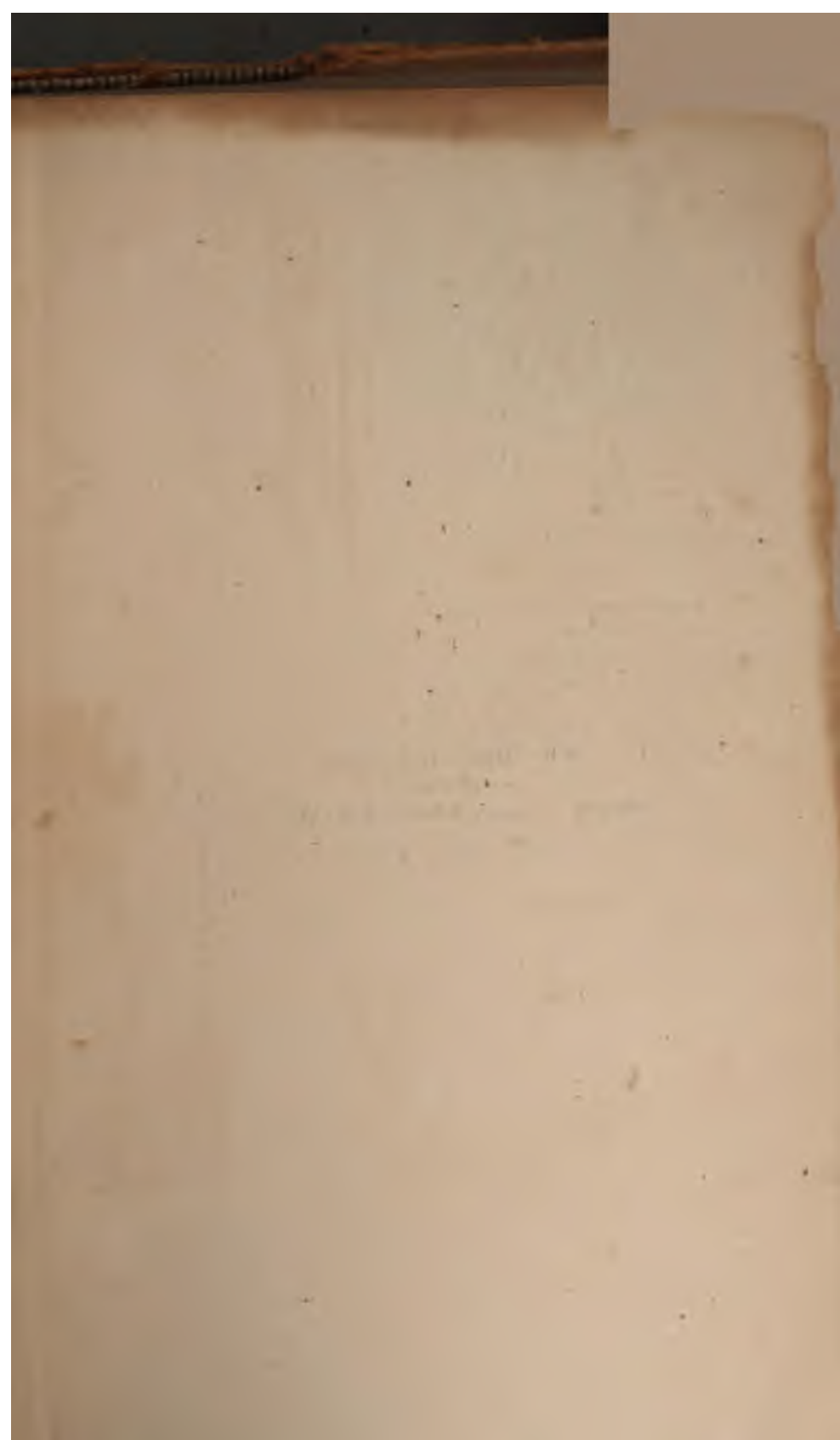
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THE
LAW OF RAILROADS
IN
PENNSYLVANIA

INCLUDING THE
LAW RELATING TO STREET RAILWAYS

BY
ALBERT B. WEIMER
OF THE PHILADELPHIA BAR

IN TWO VOLUMES
VOLUME I

PHILADELPHIA
T. & J. W. JOHNSON & CO.
1893.

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PREFACE.

In a State where there have been already published over five hundred volumes of reports, text-books based upon the law as declared by the State courts are an appropriate and almost essential aid to every practitioner. Such works are also becoming more and more necessary owing to the increasing tendency of our courts to look only to Pennsylvania decisions for precedents. In the particular subject of railroad law no State has so completely covered the field as Pennsylvania. Almost every legal proposition on the subject may be supported and illustrated by cases from our own reports. In some particular subjects the variety of cases is astonishingly great, and extends to almost every conceivable combination of circumstances. The chapters on Stock Subscriptions, and some of the chapters on Negligence in the present work are illustrations of this.

The author has aimed to make the work in its arrangement as practical as possible. In accident cases the facts of each case have been set forth. From many of the leading cases portions of the opinion have been quoted at length to show the origin of the more general legal principles involved. The statutes relating to railroads and a number of forms are printed in the appendix.

A. B. W.

PHILADELPHIA, Nov. 1, 1893.

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OF

PENNSYLVANIA.

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Act April 4, 1868.

1. Railroad companies are at present organized under the Act of April 4, 1868. The object of this act was to vest in voluntary associations of individuals, under definite, uniform, and general rules, powers which had been previously given only by special acts of incorporation. It applied to railroad companies in the sense in which the term had always been employed.* Passenger railways were expressly excluded from its operation, and it contained no reference to lateral railroads. The companies to be chartered under it were made subject to the provisions of the General Railroad Law of 1849.¹

¹ Edgewood R. R. Co.'s Ap., 79 Pa. 257 (1876).

After letters patent were issued to a corporation, a deed to the company was held good, although the company was not so far organized as to elect officers; *Rathbone v. Tioga Navigation Co.*, 2 Watts & Serg. 74 (1841).

A Railroad Company is a Private Corporation.

2. A railroad company is a private corporation within the meaning of art. XVI, § 4, of the Constitution of 1874, relating to cumulative voting.¹

A Railroad Company is a "Person."

3. A railroad company is a "person" within the meaning of the road laws, and as such is entitled to notice of a view, as the owner of improved property. The company has as much right to notice to give it an opportunity by its agents to represent its interest as a natural person has. The dominion and title to the perpetual use of the ground for the purposes of its charter are as complete as that of any natural person and its interests in its improvements may be as great.²

Grant of Corporate Powers.

4. The grant of corporate powers is to be taken most strongly against the grantees.³

BLACK, C. J., in *Com. v. Erie & North-East R. R. Co.* said: "When an act of incorporation authorizes the making of a railroad which is not possible to make without using the streets of a town or part of it, still such streets cannot be so used if the same act of incorporation forbids it. If the powers given to the incorporators cannot be executed without disregarding the restrictions with which they are coupled, they cannot be executed at all. In a private deed, an exception as large as the grant, is void because private deeds are construed most strongly against the grantor. But a grant of privilege by the State, to a body of adventurers must be construed pre-

¹ *Pierce v. Com.*, 104 Pa. 150 (1883).

² *Road in Lancaster City*, 68 Pa. 396 (1871).

³ 27 Pa. 339 (1856).

cisely the other way—in favor of the public and against the grantees. A prohibition, exception, or reservation in a charter must therefore stand in full force, though it destroy or make nugatory all the powers given to the company.”

Whatever powers are granted by the powers of a railroad company, either in express terms or by necessary implication, may be exercised by the company, but beyond that it cannot go. In regard to this kind of grant, the ordinary rule of construction is reversed, and the charter is to be construed liberally in favor of the public, and most strongly against the grantees. A doubtful charter, or a doubtful power under a charter, cannot exist. When the power is expressly given, there can be no room for doubt; so when the implication arises naturally and necessarily out of the express powers, the right is equally clear. If the powers or privileges be coupled with conditions, they must be strictly complied with; but if no conditions be annexed, the powers granted may be exercised in a reasonable manner, having due regard to the rights of others whose interests may be affected thereby.¹

The grant of “a right of way fifty feet wide through the commons of the city (Allegheny) to Federal Street,” is limited to the right of passage, and to receiving and discharging freight and passengers within the fifty feet fixed by the grant. It confers no authority on the company to occupy any ground beyond the fifty feet granted; and it is incumbent on the company to enjoy their easement in such a manner as to guard against trespasses being committed on land not included in the grant, by their agents or customers in transacting the business of receiv-

¹ Pittsburgh, Fort Wayne & Chicago R. R. v. Pittsburgh, 1 Pittsburgh Rep. 392 (1856).

ing and discharging freight and passengers. Nor has the company a right to occupy any part of the fifty feet by any structures except the railroad itself.

In *Mayor of Allegheny v. Ohio & Pennsylvania R. R. Co.*, LEWIS, C. J., said : " The company, like individuals, are responsible for all the consequences to which their acts necessarily lead. If they stop their trains on that part of the road, for the purpose of receiving and discharging freight and passengers, without guarding the common from trespasses committed in arriving and departing, and in loading and unloading, and without providing suitable accommodations for those purposes, on their own ground, they become parties to the intrusion. The right to receive and discharge passengers, even within the fifty feet, exists only by implication, and is not to be carried farther than necessity requires. As the present terminus of the railway is at this point, this right would seem to be to some extent a necessary incident of the right of way. But the company have no right to occupy any part of the fifty feet by any structures except the railroad itself. They have no authority, under the contract or otherwise, to erect, even within the fifty feet, any warehouses, depot-houses, car-houses, wood-houses, water-houses, or any other buildings for receiving or discharging passengers or freight on that part of the railroad which passes through the common. Wagons, drays, and carriages have the privilege to receive and discharge freight and passengers on the public highways, but their owners have no right whatever to erect permanent buildings there for the accommodation of their trade in this respect. The railroad company must be governed by the same rules of law. The practice of detaining their cars and locomotives on that part of the railroad, for long periods of time, and thus using the ground for the pur-

poses of a car-house or engine-house, is an abuse of the privileges granted by the contract. A detention for the period necessary to receive and discharge freight and passengers is all that is authorized. Every right of property over the fifty feet, except the right of way and the incidents absolutely necessary to its enjoyment, remains, as before, in the city of Allegheny."¹

Under the Act of March 13, 1847, authorizing any railroad company to run cars over another road connected with their own, if the latter consented, did not give to the Pennsylvania Railroad Company the right to run its cars over the State road from Columbia to Philadelphia, no connection having been made when suit was brought.² Nor could such right be exercised by the Pennsylvania R. R. Co. in connection with an individual.³

Where a city has built a line of railroad on its streets to the city limits in pursuance of an agreement with the State, by which the State built a line to connect with the city road, the city is bound to maintain its railroad as long as it is necessary for the purposes of its original construction. When, however, the State removes its road and adopts another terminus, the city road may then be removed from the streets by the municipality.⁴

Under the Act of April 14, 1843, a railroad company was to receive from the State certain tolls of a canal then owned by the State, which tolls were to cease when "the net proceeds of the road, after paying necessary expenses of motive power and superintendence, exceed six per cent. per annum." The net receipts, after paying expenses, were less than six per cent. on capital stock and

¹ 26 Pa. 355 (1855).

² *Pennsylvania R. R. Co. v. Canal Commissioners*, 21 Pa. 9 (1852).

³ *Miller v. Canal Commissioners*, 21 Pa. 23 (1852).

⁴ *Philadelphia v. Philadelphia & Reading R. R.*, 58 Pa. 253 (1868).

funded debt, but exceeded six per cent. on the capital stock. The court held that the grant had ceased.¹

Where a railroad company was authorized to appropriate four rods in width and no more, except in deep cuts and fillings, or at points selected for depots or engine and water stations, and was given five years to complete its road, and it constructed within the five years a horse road only, it could not, after the expiration of the five years, appropriate land for engine and water stations.²

A company authorized to build a railroad for the development of its own lands cannot build a railroad beginning at a point on other lands than their own for the accommodation of the public. Thus an act authorized a company to hold land and "to mine for coal-oil and other minerals," and also to have the right to construct a railroad from any of their lands to connect with any road or roads now built or hereafter to be constructed, or to any navigable stream. The court held that the terminus *a quo* must be on the company's own lands, and that it could only build a road for the transportation of its own products.³

Under the Act of April 16, 1838, which prohibits the erection of buildings on the embankment of the Phila. & Columbia R. R. without written permission from the Canal Commissioners, it was held the buildings could not be erected on enlargements of the embankment.⁴

Grant of Franchise cannot be Claimed by Implication.

5. A corporation which sets up a franchise, or a power or authority as a justification for doing a particular thing,

¹ West Branch Canal Co. v. Elmira & Williamsport R. R. Co., 55 Pa. 180 (1867).

² Plymouth R. R. Co. v. Colwell, 39 Pa. 337 (1861).

³ Warren & Franklin Ry. Co. v. Clarion Land Co., 54 Pa. 28 (1866).

⁴ Downing v. McFadden, 18 Pa. 334 (1852).

must show a grant in express words from the legislature of such franchise, power, or authority. It cannot be claimed by any implication or intendment of law, unless, indeed, it be an implication so necessary and absolute that it cannot possibly admit of any doubt or denial.

Thus power given to a railroad company under the Acts of April 13, 1846 (P. L. 312), and April 12, 1864 (P. L. 396), to intersect or cross "any established road or way" and "in the manner and subject to the conditions and provisions hereinbefore provided in relation to the main line of their railroad by this act authorized to be made, to make such lateral railroads or branches leading from the main line of their said railroad to such convenient place or points, into either of the counties, into or through which the said main line of their road may pass, as the president and directors may deem advantageous and suited to promote the convenience of the inhabitants thereof and the interest of said company," does not authorize the building of an elevated railroad over and across the streets of a municipality without the consent of the municipality obtained in accordance with the Acts of June 9, 1874 (P. L. 282), and May 31, 1887 (P. L. 275). THAYER, P. J., said: "The city in its bill filed avers that the defendants have undertaken and propose to build this road, and to bridge the streets of the city, without the consent of the city thereto, and that this is contrary to law. The bill goes further, and charges that the defendants have no warrant of law for the construction of said road, either with or without the consent of the city, and that the proposed action of the defendants is a naked usurpation of power, without any foundation or authority therefor.

"The defendants contend that they have the right to build the proposed road as a branch road under the Acts

of April 12, 1864, and April 13, 1846. The Act of April 13, 1846, incorporating the Pennsylvania Railroad Company (P. L. 312), § 17, enacts that 'it shall be lawful for the said company, in the manner and subject to the conditions and provisions hereinbefore provided in relation to the main line of their railroad by this act authorized to be made, to make such lateral railroads or branches, leading from the main line of their said railroad to such convenient place or points, into either of the counties, into or through which the said main line of their road may pass, as the president and directors may deem advantageous and suited to promote the convenience of the inhabitants thereof and the interests of said company.' The Act of April 12, 1864, extends the provisions of the 17th section of the Act of 1846 to the Philadelphia & Reading Railroad Company. It enacts (P. L. 396) that 'so much of the 17th section of the Act of April 13, 1846, entitled "An Act to incorporate the Pennsylvania Railroad Company," as confers the right of making lateral or branch roads leading from the main line of their railroad to places or points in either of the counties into or through which the said main line may pass, under the provisions and restrictions therein mentioned, be, and the same is hereby extended and applied to the Lebanon Valley and the Philadelphia & Reading Railroad Company.'

"The defendants declare in their answer that they have power under these acts to cross any street or highway in the commonwealth, either by an elevated road or at grade; nay more, that they have the right to build branch roads in the city of Philadelphia, either at grade—that is, along the streets of Philadelphia—or as elevated roads above them. And that they have the right to do this either with or without the city's consent, according to their own

discretion and pleasure. While they allege their purpose to be to build an elevated road they distinctly claim the right to build the road at grade if they choose, and for that purpose to occupy whatever streets may be necessary, and they also claim the right to build as many branches as they please in the city from their original main line, and also from any part of the Northern Liberties & Penn Township Railroad, a road purchased by them, and which became, according to the answer, a part of their main line in 1857, or from that portion of the Columbia & Philadelphia Railroad lying east of the inclined plane, which they purchased from the State.

“But these large claims are somewhat broader than the particular issue arising out of the pleadings filed in the case, which is whether the defendants are authorized by law to build the elevated road described in the bill and answer, in the manner, and over the route therein mentioned, without the consent of the city of Philadelphia. This is the precise question to be decided in this case.

“It is a fundamental principle which admits of no exception that a corporation which sets up a franchise, or a power or authority as a justification for doing a particular thing, must show a grant in express words from the legislature of such franchise, power, or authority. It cannot be claimed by any implication or intendment of law, unless indeed it be an implication so necessary and absolute that it cannot possibly admit of any doubt or denial. The case of the Cleveland & Pittsburgh R. R. Co. *v.* Speer, 56 Pa. 325, is an illustration. The doctrine is tersely put by BLACK, C. J., in the case of *Commonwealth v. Erie & North-East R. R. Co.*, 27 Pa. 351: ‘If you assert that a corporation has certain privileges, show us the words of the legislature conferring them. Failing in this you

must give up your claim, for nothing else can possibly avail you. A doubtful charter does not exist, because whatever is doubtful is decisively certain against the corporation.' Corporate power can never be created by implication, nor extended by construction. No privilege is granted unless it be expressed in plain and unequivocal words, testifying the intention of the legislature in a manner too plain to be misunderstood. In the construction of a charter, to be in doubt is to be resolved, and every resolution which springs from doubt is against the corporation: *Penna. R. R. v. Canal Commissioners*, 21 Pa. 9.

"All railroad charters are to be interpreted by a strict construction of the words of the grant. Whatever is not unequivocally granted is taken to have been withheld. All acts of incorporation, and all acts extending the privileges of incorporated bodies, are to be taken most strongly against the companies: *Commonwealth v. Pittsburgh & Connellsville R. R. Co.*, 24 Pa. 161; 2 Cranch, 167; 9 Howard, 184; 96 U. S. 338; 12 Wall. 65; 21 Ill. 205; 13 Howard, 71. If they step one inch beyond their chartered privileges to the prejudice of others they are liable to be enjoined, irrespective of the amount of damages: 24 Pa. 161.

"The authority to build the road in question in this case is claimed by the defendants, under the Pennsylvania Railroad Act of 1846, and the Act of 1864, extending the 17th section of that act to the Philadelphia & Reading Railroad Co. I have already quoted both of the provisions referred to. By these acts the defendants are authorized to make such lateral railroads or branches leading from the main line of their said railroad to such convenient place or points into either of the counties into or through which the said main line of their road may

pass as the president and directors may deem advantageous and suited to promote the convenience of the inhabitants thereof and the interests of said company. The act incorporating the Pennsylvania Railroad contained no power to occupy any road or street, but only a power to *intersect or cross 'any established road or way.'* A supplement, however, passed March 27, 1848 (§ 5), (P. L., p. 275), gave them the right to occupy any part of any turnpike or public road, and an act passed April 12, 1851, § 1, P. L. 518, extending the provisions of the Act of March 27, 1848, to the 'streets, lanes, and alleys in any town, borough, or city through which said road passes.' The Act of May 16, 1857, P. L. 519, authorizing the sale of the public works, gave them, when they purchased the railroad from Columbia to this city, the right to 'possess, hold, and use the same under the provisions of their act of incorporation and any supplements thereto, modified, however, so as to embrace all the privileges, restrictions, and conditions granted by this act in addition thereto.' These acts, it was held in *Pennsylvania Railroad v. Duncan*, decided in 1886, 111 Pa. 362, authorized the construction of the road on Filbert Street by the Pennsylvania Railroad, affirming the previous construction of a similar act in *McAboy's Ap.*, 107 Pa. 548. But neither the Act of March 27, 1848, nor those of April 12, 1851, and May 16, 1857, had any application to the Philadelphia & Reading Railroad Co., and cannot be invoked as conferring upon that company any power over the streets of this city. Whatever power they have in that respect they must claim under their charter, under the 17th section of the Act of 1846, and the Act of April 12, 1864, or under the Acts of June 9, 1874, P. L. 282, and March 31, 1887, P. L. 275. About the last two acts I shall have something to say presently. Neither the Act of 1846,

nor that of 1864, gave any power to occupy roads or the streets of a city or town longitudinally. The Act of 1846 gave the Pennsylvania Railroad Co. authority to '*intersect or cross* any established road or way,' and no more. The same right was given to the Philadelphia & Reading Railroad Co. by the Act of 1864, as well as by their charter, and no more. The word 'street' was nowhere used in either of those acts, nor is there any reason to suppose that either of those acts contemplated the invasion of the streets of cities by branch steam roads. If the general terms 'road or way' are to be construed (under the rule of strict construction to be applied to such grants) as conferring an authority to cross any number of streets they may please, and if that authority has not been impaired or modified by any subsequent legislation to which they are constitutionally subject, then the defendants have the right *to cross*, and no more. The legislature has, without doubt, absolute control and authority over all the highways of the commonwealth, whether they be township roads, county roads, streets in boroughs, or streets in populous cities. Since the decision in the Philadelphia & Trenton Railroad Co.'s Case, 6 Wharton, 25, it cannot be gainsaid that a power delegated by the legislature to a railroad corporation to lay their rails upon the streets of a city or town is a constitutional and binding exercise of legislative authority: *Mifflin v. Railroad Co.*, 16 Pa. 192; *Commonwealth v. Erie & N. E. R. R.*, 27 Pa. 354; *Cleveland & Pittsburgh Railroad v. Speer*, 56 Pa. 325. But the delegation of this authority must be clear and explicit. When, therefore, such a case as *Pittsburgh v. Pennsylvania Railroad Co.*, 48 Pa. 355, is cited as an authority to prove that railroad corporations have the right to occupy the streets of cities, the authority bestowed upon that company by the Act of

April 12, 1851, already referred to, is to be borne in mind. Without that authority it would seem that the decision must have been different, for the original charter of 1846 gave them no such power. The Pennsylvania Railroad did not pass through the streets of Pittsburgh by virtue of their charter of 1846, but by the authority granted by the supplement of 1851. The case of the Cleveland & Pittsburgh Railroad *v.* Speer, 56 Pa. 325, does not sustain the position assumed by the defendants, for there it was held that the company had authority to occupy the street by an absolute necessary implication in their charter, which had the force of a grant in express words. *McAboy's Ap.*, 107 Pa. 548, after all that was said, had to be grounded upon the Act of June 9, 1874 (P. L. 282), authorizing municipal authorities to enter into contracts with railroad companies to re-locate, change, or elevate their railroad. Section 14 of the defendants' charter (P. L. 1832-33, p. 152), does not contain the word 'streets,' as seems to have been supposed on the argument, but gives them authority in building their railroad to *cross* 'any public road.' If that is to be held an authority for locating and building a branch road on the streets of Philadelphia, it is certainly not by the application of that strict rule of construction of corporate grants to which I have referred. Their charter gave them no authority to appropriate the streets for any such purpose. It authorized them in the construction of their original road to cross 'public roads,' just as the Pennsylvania Railroad charter authorized that company to do the same thing. To argue from the cases decided relative to the use of the streets of cities and towns by the Pennsylvania Railroad, by virtue of the supplements obtained to their original charter by that company, that those decisions define the rights of other railroad companies which have no such

supplements, and no equivalent authority derived from any source whatever, is to reason from false premises. It would seem at first blush that the case of Pennsylvania Railroad Co.'s Ap., 115 Pa. 514, was in collision with the case of *Pittsburgh v. Pennsylvania Railroad Co.*, 48 Pa. 355, but this is only in consequence of the second syllabus in the report of the former case. Bad syllabuses have made much bad law. Whatever may be said of the opinion of Judge TRUNKEY in that case, a critical examination of the case will show that the real point of the decision was that the branching power of the Pennsylvania Railroad does not extend to their leased lines, and the decision is not in conflict with *Pittsburgh v. Pennsylvania Railroad*. Judge TRUNKEY in his opinion distinctly refers to the Acts of March 27, 1848, and April 12, 1851, as the sources of the authority of the Pennsylvania Railroad Co. to occupy, longitudinally, the roads and streets of the commonwealth, 115 Pa. 526, and those acts do not extend to the Philadelphia & Reading Railroad Co.

"The cases of *Black v. Philadelphia & Reading Railroad Co.*, 58 Pa. 249, and *Getz's Ap.*, 10 W. N. C. 453, so much relied upon, were both clearly cases relating to the construction of sidings. In both cases they are spoken of as sidings throughout. There can be no doubt that the defendants have the right to construct sidings for the accommodation of trade, and for the proper operation of their road, but that does not in any way assist their claim to occupy the streets in the construction of branch roads. In the *Western Penna. R. R. Co.'s Ap.*, 99 Pa. 155, the railroad whose rights were in question was incorporated under the Act of April 4, 1868, P. L. 65, the 12th section of which expressly prohibited companies formed under that act from occupying any street in any incor-

porated city without the consent of such city, and the railroad obtained such consent, which settled the question. *Commonwealth v. Erie & N. E. R. R. Co.*, 27 Pa. 339, is diametrically opposed to this part of the defendants' case. In short, without dwelling further upon this branch of the case, and without any further sifting of the cases, I may say that my researches have failed to find any Act of Assembly or any decided case which justifies the argument made by the defendants, that under the branching power acquired by the Act of 1864, or under any other act which has been cited, they would have any authority to build a surface branch starting either at the Falls of Schuylkill, on their main line, or at Broad and Noble, which they made a part of their main line in 1857, and which would traverse and occupy the streets of Philadelphia in any direction and as far as they might see fit to build it, without the consent of the city. If, under the power conferred by the Acts of 1846 and 1864 to make lateral roads or branches from their main line into any county through which their main line passes, the defendants are authorized to run steam trains through the streets of the city of Philadelphia, longitudinally or otherwise, without the consent of the city authorities, when they can build the surface road which they contend they have the right to build from their main line at the Falls of Schuylkill, or from Broad and Noble, which they allege in their answer was on their main line in 1864. But it appears to me that such construction of the Acts of 1864 and 1846 would be altogether opposed to the well-established rule that all such grants of power are to be strictly construed, and that what is not granted by express words, or absolutely necessary implication, is withheld and does not exist. I know of no case in Pennsylvania or elsewhere, which would justify such an interpretation of the Acts

of 1864 and 1846 as the defendants contend for. The cases relied on do not, in my opinion, maintain any such position.

“ But the defendants contend that they have the right to build the elevated road in question without the city’s consent, by virtue of the branching power, and their right, in the exercise of that power, to *cross* any street or public highway of the commonwealth. Much time and effort were expended by the learned counsel upon the question, whether the point from which the defendants propose to start their elevated railroad (in Noble Street below Broad) is upon their ‘main line,’ in the sense in which those words are used in the Act of 1864. Upon that question we are of the opinion that the main line there referred to is the main line existing at the passage of that act, and not what was the main line of the Philadelphia & Reading Railroad established under the act of incorporation of 1833. By an act passed May 5, 1855, P. L. 610, the Philadelphia & Reading Railroad were authorized to purchase the Northern Liberties & Penn Township Railroad, ‘and to annex the same to their own road, of which it shall thereafter become a part,’ or to purchase the shares of the capital stock of said railroad. Prior to the passage of the Act of 1864 the defendants, according to the statement contained in their answer, which we must regard as conclusive for the purposes of the present argument, had acquired the ownership of the Northern Liberties & Penn Township Road, under the Act of 1855, and it had become a part of their main line, although the two roads were not actually and formally merged until May 8, 1871 (see answer, pp. 10, 11, 12, 13, 14, 15). The Act of 1855 provided two methods by which they might become the owners of the Northern Liberties & Penn Township Road, viz.: by the purchase of the road,

out and out, or by the purchase of the stock. That the legislature considered these as only alternative methods of accomplishing the same object is apparent from the fact that they added to the authority to purchase the stock a proviso that if the company should do so they should relay the road and pave the street from Broad Street to the Delaware River. That the company considered that in purchasing the stock under this act they were really purchasing the road is obvious from the fact that immediately upon the purchase of the stock they purchased large and expensive wharf properties at the terminus, and constructed there depots for the freight business, and the transportation of their freight by water carriage to points beyond the city, and assumed and have ever since maintained an exclusive control over the whole road, making it an integral part of their system, and, as they declare in their answer, a part of their main line. In their answer, p. 15, the defendants declare that at the time of the passage of the Act of 1864 they had acquired the *ownership* of the Northern Liberties & Penn Township Road, and on p. 17 and elsewhere they distinctly aver that this road was a part of their main line, and became such prior to the passage of the Act of 1864. It is a familiar rule that when a case is set down for hearing on bill and answer every fact stated in the answer is admitted to be true. The complainants therefore are not in a position to gainsay these facts. Nor ought the fact that the defendants did not, for reasons of their own, elect to make a formal merger of the two roads until May 8, 1871, make against the defendants. At that time they had owned and operated the Northern Liberties & Penn Township Road as their own for fourteen years, according to their answer, viz.: since 1857, and they have continued to do so ever since.

“We think it clear that what the legislature intended by the words ‘main line,’ used in the Act of 1854, was not any previous main line, nor any line which might at some future time become a main line, but that which was the defendants’ main line at the time of the passage of the Act of 1864. If we concede, then, that the Northern Liberties & Penn Township Road was, as the answer avers it was, a part of the defendants’ main line on April 12, 1864, it would follow, if they have the right under their charter to build an elevated railroad from that point without the consent of the city, that they might *cross* the streets in doing so. I have said *if* they have the right to build an elevated railroad in the city without the consent of the city. I have already endeavored to show that they have no warrant of law to occupy the streets longitudinally without the consent of the city. Whether they would have the right, without the aid of the Acts of 1874 and 1887, under the power to build branch roads from their main lines into the counties through which their main line passes, to build an elevated road from a point on their main line in the city to any other point or points in the city they might select, without the consent of the city, crossing any street which might be necessary for that purpose, may admit of serious doubt. It might well be argued that they must show a more explicit grant of authority to do that. But, however that question might have been resolved before the Acts of June 9, 1874, P. L. 282, and May 31, 1887, P. L. 275, we are of opinion that, since the passage of those acts, they have no right to build such a road without the consent of the city. The Act of June 9, 1874, P. L. 252, enacts that ‘the proper authorities of any county, city, town, or township are authorized to enter into contracts with any of the railroad

companies whose roads enter their limits, whereby the said railroad companies may relocate, change, or elevate their railroads within said limits, in such manner as in the judgment of such authorities may be best adapted to secure the safety of lives and property, and promote the interest of said city, etc.' This act contains, it seems to us, at least by a necessary implication, a prohibition of the building, by any railroad company, of elevated roads in a city without a previous contract entered into between such company and the city authorities. It was argued that the act applies only to railroads built at the time of its passage, but that would be a very inadequate interpretation of its scope and meaning. It authorizes the city to enter into a contract with 'any railroad company whose road enters the city.' These words embrace the defendant company. We think the prohibition was aimed not only at existing roads, but all future roads which any company may design to lay within the city limits. It is so treated by the Supreme Court, in the opinion delivered by Judge GORDON in *McAboy's Ap.*, 107 Pa. 557, in which he says: 'The Act of 1874, though it may be regarded as conferring no new rights upon railroad companies, having, as in the present instance, the branching power independently of this statute, yet even as to them it may be treated as a police regulation *empowering the public authorities, for the safety of the people, to control the action of such companies.*' Judge MITCHELL seems to have entertained the same view in the opinion delivered by him in the case of *Duncan v. Penna. R. R. Co.*, 94 Pa. 444. Indeed, any other construction of the act would be an interpretation which would stick in the bark, and render the act abortive to accomplish the purpose which the legislature plainly intended to accomplish, which was to prohibit the construc-

tion of all railroads in cities, except, as the Supreme Court in effect says in *McAbey's Appeal*, under the control of the city authorities. But if it could be successfully argued that the Act of 1874 applied only to existing roads already laid, what shall be said of the Act of May 31, 1887, P. L. 275, and how can the defendants escape from that act, which declares that 'railroad companies, *now or hereafter incorporated*, whose route extends through or into any city of this commonwealth, may elevate or depress the whole or any part of so much of the line of their railroad as lies within the corporate limits of such city, over or under the surface of such city, provided that the consent of said city, through its councils, to such elevation or depression be first had and obtained. And provided, also, that any conditions imposed by ordinance granting such consent, regulating, or restricting the carriage of freight, or as to route, manner of construction, motive-power to be used, etc., etc., shall be valid and binding upon such railroad company so accepting the same.' The words of this act are 'railroad companies, *now or hereafter incorporated*,' which shows that it was intended to apply to all future roads which might be built, as well as roads built when the act was passed, and it is not possible, by reason of its title, to restrict its operation to roads built under the Act of 1868. The effect of this act is to prevent the construction of any elevated railroad in any city of the commonwealth without the consent of the city. That was its plain purpose and intent, and it is the duty of all courts of the commonwealth to enforce it, because it is the law, and its enforcement is imperatively demanded for the protection of the lives and property of the people who dwell in cities. That the Philadelphia & Reading R. R. Co., although chartered in 1833, is a corporation

subject to the operation of these acts does not admit of doubt. It was so expressly determined by the Supreme Court in the case of the Phila. & Reading R. R. Co. *v.* Patent, 17 W. N. C. 199, affirming the judgment of this court. It was held in that case, that the Philadelphia & Reading R. R. Co. had, by the acceptance of acts passed subsequently to the constitutional amendment of 1857, authorizing the legislature to change the charters of incorporated companies, brought itself within the purview of that amendment and subjected itself to the operation of all the subsequent legislation, as well as to the Act of May 3, 1855, P. L. 423, which enacted that all charters granted or to be granted should be deemed subject to the power of the legislature to alter or revoke them. In the case now before us the defendants base whatever claims they have to build the proposed elevated railroad upon the Act of April 12, 1864. Claiming, therefore, the benefit of that act, they are, without doubt, subject to the legislative control given by the constitutional amendment of 1857, and so are clearly subject to the provisions of the Acts of June 9, 1874, and May 31, 1887. Therein their case differs fundamentally from the case of the Williamsport Passenger Railway's Ap., 120 Pa. 1, upon which they rely, in which case the corporation had not accepted the benefit of any new legislation taking effect after the constitutional amendment of 1857.

"The conclusion of the whole matter is, that we are of opinion that the defendants may construct the proposed elevated railroad with the consent of the city, and subject to such reasonable conditions and restrictions as the city authorities may impose, in order 'to secure,' in the words of the Act of 1874, 'the safety of lives and property, and promote the interest of the city,' but that the defendants have no right to build the road in question

without the consent of the city, or without subjecting themselves to the conditions imposed by the Acts of 1874 and 1887.”¹

Injunction.

6. Railroad companies acting in excess of their chartered privileges are liable to be enjoined, irrespective of the amount of damage. Thus, where a railroad company attempted to fill up a part of the State canal and to erect an arch over it, it was enjoined at the instance of the commonwealth, although it appeared that the portion of the canal affected had scarcely ever been used, and had for many years lain in a state of abandonment.²

After a bill for an injunction is filed to restrain a railroad company from going on with the construction of its road, the defendants go on with their road at their peril before final hearing.³

A railroad company may be enjoined from building a swinging bridge over a canal when the bottom of the bridge is to be within three feet of the surface of the water.⁴

To entitle a party to a preliminary injunction, the injury complained of must not be merely technical or fanciful, but it must be real and substantial, and the danger threatened must be immediate and urgent.⁵

In *Pennsylvania R. R. Co. v. Canal Commissioners*,⁶ it

¹ *Phila. v. Philadelphia & Reading R. R.*, 7 Pa. C. C. R. 390 (1889).

² *Com. v. Pittsburgh & Connellsville R. R. Co.*, 24 Pa. 159 (1854).

³ *Warren & Franklin Ry. Co. v. Clarion Land Co.*, 54 Pa. 28 (1866).

⁴ *Pennsylvania Canal Co. v. Pennsylvania & Reading R. R.*, 2 Parsons, 354 (1879).

⁵ *Harrisburg R. R. v. Slate Valley R. R.*, 1 Northampton County Rep. 11 (1887); *Wind Gap & Delaware R. R. v. Penna., S. & N. E. R. R.*, 1 Northampton County Rep. 179 (1882); *Wind Gap & Delaware R. R. v. Penna., S. & N. E. R. R.*, 1 Northampton County Rep. 181 (1882).

⁶ 21 Pa. 9 (1852).

appeared that by the Act of April 23, 1852, the Pennsylvania R. R. Co. was authorized to purchase and hold certain real estate in the county of Philadelphia "for such objects as appertain to the legitimate business of the company, authorized by their act of incorporation of transporting passengers over their own and the Columbia Railroad." The charter of the Pennsylvania Railroad Company gave it no authority to run its cars over the Columbia Railroad. The court refused to construe the Act of 1852, so as to give to the Pennsylvania R. R. Co. the right to run its cars over the State road. BLACK, J., said: "An error is not converted into a truth by the mere recital of it in an Act of Assembly."

Legislative Promise.

7. The courts will not enforce a legislative promise. Thus, terms of a present grant to a railroad company will not be enforced if the given right be with reference to something which does not exist at the time of the grant. A street railway company was authorized by its act of incorporation "to connect with any passenger railway now constructed, or hereafter to be constructed, so as to give them a complete route from Fairmount to the Exchange." The court held that the company could not connect with another passenger railway company which was not built, nor the right of building granted, at the time the plaintiff's act of incorporation was passed.¹

¹ North Branch Passenger Railway Co. v. City Passenger Railway Co., 38 Pa. 361 (1861).

CHAPTER II.

SUBSCRIPTION TO STOCK.

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| 8. Contract of Subscription Must be in Writing. | 26. Duties of Commissioners. |
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Contract of Subscription Must be in Writing.

8. The contract of subscription must be in writing and must specify the name of the company whose shares are subscribed for. Thus a promise made by a person to no particular party to subscribe "for the purpose of connecting Pittsburgh by a railroad with the Steubenville &

Indiana Railroad Company," cannot be appropriated, even under an Act of Assembly by a company incorporated to build a railroad down the Ohio River from Pittsburgh to Steubenville.¹

Effect of Subscription.

9. An original subscriber to the capital stock of a railroad company cannot relieve himself from liability for unpaid subscriptions to the stock by transferring his stock to another person. Even if the board of directors consent to the transfer he will not be relieved from liability.²

A transfer of stock upon which there are unpaid installments, passes no title to the assignee unless the board of directors give their consent in the manner prescribed by section 7 of the Act of February 19, 1849.

In *Pittsburgh & Connellsville R. R. Co. v. Clarke*, LEWIS, C. J., said: "So long as the stock remains unpaid the corporation has a right to refuse to receive new members in place of original adventurers. Until the stock is fully paid up and the stockholders otherwise free from debt to the company they have no right whatever to introduce strangers into the company in their places. A right which depends upon the consent of others is no right at all. The transfer to Mr. Stanton was therefore of itself a nullity. An attempt was made to give it a vitality by parol evidence from which the consent of the board of directors was to be inferred by the jury. But there is no evidence tending to show that the question was ever presented to the consideration of the board, or that any action was taken by the board in regard to the transfer.

¹ *Pittsburgh & Steubenville R. R. Co. v. Gazzam*, 32 Pa. 340 (1858).

² *Pittsburgh & Connellsville R. R. Co. v. Clarke*, 29 Pa. 146 (1857); *Graff v. Pittsburgh & Steubenville R. R.*, 31 Pa. 489 (1858); *Everhart v. Philadelphia & West Chester R. R.*, 28 Pa. 339 (1857).

In ordinary business transactions between a corporation and strangers, the authority of agents and the existence of contracts may be implied from acquiescence and other circumstances. So, where the assent of the board is required by a by-law only, the execution of the by-law may be modified by the practice of the corporation: *Insurance Company v. Smith*, 1 Jones, 126. But where the act of incorporation grants a power, the mode prescribed by the statute for its exercise must be strictly pursued."¹

Subscription before Organization of Company.

10. An action does not lie by a railroad company against one who before the company was organized, with others, signed a paper agreeing to take a certain quantity of stock, and afterward refused to do so.

In *Strasburg R. R. Co. v. Echternacht*, BLACK, C. J., said: "A contract cannot be made by one person alone. It takes two to make a bargain. Before a promise becomes a binding obligation, it must not only be made to, but must be expressly or impliedly accepted by the party for whose benefit it was meant. The paper before us is no more than a naked expression of the subscriber's intention to purchase certain shares in the capital stock of a company which it was expected would be incorporated by the legislature. Besides, it is without any sufficient consideration. It is not pretended, and cannot be made out from the paper that the agreement of the defendant was the motive of the others for taking stock. It is well settled that procuring legislation of any kind is not a consideration which will support even a direct promise to pay a fair compensation for the labor of the promisee about such a business. Again: if there was a

¹ 29 Pa. 146 (1857).

binding engagement, it was not made with the railroad company, which did not exist at this time."¹

Evidence of Subscription.

11. The stock ledger of a corporation is proper evidence against members of a company who have acted as directors.²

The subscription books are evidence against a corporator, present and assenting to the entries made in them.³

A return of the subscriptions to the governor is evidence of a subscription by one of the commissioners.⁴

A subscription for additional stock made by a director of a railroad company for a large stockholder to relieve the company from financial embarrassment, and acquiesced in for seven years by the stockholder, is evidence for the jury as to the validity of the subscription.⁵

Conditional Subscription : General Principles.

12. Where subscriptions are made to the stock of a proposed public corporation, previous to and for the purpose of procuring a charter, any conditions annexed thereto, whether written or parol, are void. After the organization of the company, a condition is binding and obligatory, and ordinarily this is so, though it rests in parol, if, except for such condition, the subscription would not have been made. The latter part of this proposition is subject, however, to the qualification that the rights of co-subscribers are not affected thereby.⁶

¹ 21 Pa. 220 (1853).

² *Hays v. Pittsburgh & Steubenville R. R. Co.*, 38 Pa. 81 (1860). See *Philadelphia & West Chester R. R. v. Hickman*, 28 Pa. 318 (1857).

³ *Graff v. Pittsburgh & Steubenville R. R. Co.*, 31 Pa. 489 (1858).

⁴ *Bavington v. Pittsburgh & Steubenville R. R. Co.*, 34 Pa. 358 (1859).

⁵ *Phila., Wil. & Balt. R. R. Co. v. Cowell*, 28 Pa. 329 (1857).

⁶ *McCarty v. Selingsgrove & North Branch R. R.*, 87 Pa. 332 (1878); *Boyd v. Peach Bottom Ry.*, 90 Pa. 169 (1879); *Bedford R. R. v. Bowser*, 48 Pa. 29 (1864).

A subscription to the stock of a railroad company prior to the procurement of its charter is absolute and unqualified, and any condition attached to the subscription is void. The commissioners who are appointed to receive such subscriptions are not the credited agents of the corporation, for it is not yet in being, but are rather the agents of the public acting under limited and definite powers, which every one is bound to know.

After the company is organized, however, conditional subscriptions for its stock are valid, and the company cannot collect assessments unless the conditions are fulfilled.¹

If after a corporation is organized the president assures a proposed subscriber that certain conditions which the subscriber suggests shall be a part of the contract, the company is bound thereby, and parol evidence of these conditions may be admitted in an action to recover the subscription, and the non-performance of conditions is a sufficient defense.²

After an Act of Assembly is approved by which a railroad company is actually incorporated, conditional subscriptions to its stock are valid, although the act provides that letters-patent shall only be issued when ten per cent. of its capital stock had been subscribed. In such a case letters-patent are not essential preliminaries of the company's organization, for that was effected by the act itself.³

Condition as to Route and Termini.

13. If the subscription paper sets out the termini and the route over which the railroad is to be constructed, and

¹ *Caley v. Philadelphia & Chester County R. R.*, 80 Pa. 363 (1876).

² *McCarty v. Selinsgrove North Branch R. R.*, 87 Pa. 332 (1878); *Pittsburgh & Steubenville R. R. v. Stewart*, 41 Pa. 54 (1861).

³ *Hanover Junction, etc., R. R. v. Haldeman*, 82 Pa. 36 (1876).

the company materially changes the termini in the route, the subscriber will be released. A railroad company was empowered to build a railroad from any point "beginning at or near the city of Philadelphia, thence by such practicable route, with moderate grades, as will, in the opinion of the president and directors, most conduce to the public interest, terminating on some point on the Pennsylvania Central Railroad, east of Downingtown station, in the county of Chester, in such manner as to connect with the said Pennsylvania Railroad." In the contract of subscription, signed by the defendant, the route and terminal points of the road are thus described: "Commencing at a point on the Pennsylvania Railroad at or near Hestonville, thence by the most practicable route to the valley of Cobb's Creek, thence along Cobb's Creek to a point near City Avenue, thence across the West Chester Turnpike road to Naylor's Run, and by the south branch through Pritchett's farm to Darby Creek, and along the valley of said creek to Fawkes's Run, thence along Fawkes's and Caley's Run to Newtown Square, thence via Sugartown and Goshenville to the most expedient route to be surveyed to West Chester, and from thence to Downingtown, as soon as sufficient funds shall be subscribed to carry on the works." It was held that the minutes of the company showing that the directors had made a material alteration in the route were proper evidence.¹

In an action for unpaid assessments to the stock of a railroad company defendant filed an affidavit of defense in which he averred that by the provisions of plaintiff's charter the city of Pittsburgh was designated as one terminus of its railroad and the borough of Washington the other; that plaintiff, while claiming to have completed its

¹ Caley v. Philadelphia & Chester Co. R. R., 80 Pa. 363 (1876).

road, had not extended it to either of the terminal points, but had terminated it eight miles from the city of Pittsburgh, and had finally abandoned its construction in the direction of that city, and that it stopped short from Washington at a point about two thousand feet, at which point it had erected a terminal station. It was held that the affidavit was sufficient to prevent judgment.¹

Defendant in an action on a subscription to stock offered to show that the contract of subscription provided for the building of the extension of the Hanover Junction & Susquehanna Railroad according to the survey made by the Philadelphia & Reading Railroad Company, and that the road as thus surveyed ran within five hundred feet of his mill, but that the route was so changed as to make the road run about twelve hundred feet from his mill. It was held that the evidence should have been admitted so that the jury might determine whether or not the variation materially affected the defendant's interest.²

Where a subscription is made on the express condition that the company shall locate and construct its road along a particular route, and the company locates its road along the route designated, but before the road is constructed, stops operations for lack of funds, the subscriber is bound to pay the balance of installments. The location of the road and the construction, as far as the means of the company would allow, was such a performance of the condition as entitled the company to enforce the contract of subscription.³

Where a railroad company purchases a railroad under foreclosure proceedings against another railroad company, a subscriber to the stock of the purchasing company can-

¹ *Chartier Railway Co. v. Hodgins*, 77 Pa. 187 (1874).

² *Moore v. Hanover Junction & Susquehanna R. R.*, 94 Pa. 324 (1880).

³ *Miller v. Pittsburgh & Connellsville R. R. Co.*, 40 Pa. 237 (1861).

not allege, as a defense against a subscription, that the railroad had not been completed to the terminal points designated by the charter of the original company which owned the road.¹

Where subscriptions are made to the capital stock of a projected railroad company, on condition that the road take a certain designated route, and on the faith of those subscriptions a charter is granted to the company, the subscriptions are binding and the condition void.²

A subscription under the Act of July 19, 1849, made to the commissioners before the organization of the company, upon condition that the road should be located on a special route, is to be deemed an absolute subscription, without reference to the condition. The act does not contemplate conditional subscriptions, and the commissioners are not authorized to receive them.³

Stipulation as to Amount.

14. A subscriber alleged that it was expressly stipulated by the agent of the company, in the presence of another witness, that his subscription was not to be paid until a certain amount had been actually subscribed. The agent denied that he had made such agreement. The subscriber then proposed to prove by the other witness, that such representations had been by the agent, although at a time previous to the subscription. The court excluded the offer. It was held on writ of error that the testimony should have been admitted as corroborative proof, and as part of a *res gestæ*.⁴

¹ Chartiers Railway Co. v. Hodgins, 85 Pa. 801 (1877).

² Pittsburgh & Steubenville R. R. v. Woodrow, 1 Pittsburgh Rep. 450 (1858); 3 Phila. 271.

³ Pittsburgh & Steubenville R. R. Co. v. Biggar, 34 Pa. 455 (1859); Bavington v. Pittsburgh & Steubenville R. R. Co., 34 Pa. 358 (1859).

⁴ Rinesmith v. People's Freight Ry. Co., 90 Pa. 262 (1879).

A proviso in a contract of subscription, that "the subscription hereto shall be binding only in the event of an aggregate of \$300,000 being subscribed, inclusive of all former subscriptions, and of such subscriptions as shall be made absolute or shall become so by the fulfillment of their conditions," is valid.¹

A subscription paper stated that the railroad was to be commenced "as soon as sufficient funds shall be subscribed to carry on the work." At a public meeting at which defendant subscribed the officers of the company stated that the money would not be called for until \$150,000 was subscribed. It was held that such statements were evidence as showing the inducement upon which the subscription was made.²

The subscription to the stock of a railroad company was upon condition "that in the judgment of the board of directors of said company a sufficient amount is subscribed to the capital stock of said company on or before the 1st day of April, 1871, to grade and bridge the road, including the right of way from South Pittsburgh to West Brownsville." The board of directors, on the 1st day of April, 1871, passed a resolution, "that in the judgment of this board the conditions named are fully complied with; that sufficient stock has been subscribed to grade and bridge the road, including the right of way from South Pittsburgh to West Brownsville." It was held that if the directors acted in good faith in passing the resolution the condition was performed.³

The condition of a subscription of stock was that the amount subscribed should be devoted to the building of a designated portion of the railroad, and should be paid

¹ *Phila. & West Chester R. R. Co. v. Hickman*, 28 Pa. 318 (1857).

² *Caley v. Philadelphia & Chester Co. R. R.*, 80 Pa. 363 (1876).

³ *Cass v. Pittsburgh, Virginia, & Charleston Ry. Co.*, 80 Pa. 31 (1876).

when the sum of \$100,000 was subscribed for that purpose. The charter provided that subscriptions should be valid on the payment of \$1 to the commissioners for each share for the use of the company; and when ten per cent. of the capital stock was subscribed and \$1 paid on each share letters-patent were to issue. It was held that the stock contract with the loss of its absolute character lost the incident of partial payment, and that such partial payment was not necessary to enable the company to recover.¹

Payment in Labor and Material.

15. A railroad company may, if acting in good faith, accept as payment for a subscription of stock labor, services, materials, damages which the company is liable to pay, or any liability of the company.²

A subscriber will not be permitted to prove an oral agreement that he was to pay his subscription in labor and materials, unless he also offers to show that he attempted to ascertain where he could do so, or had made a tender thereof.³

An agreement by the company to receive materials instead of cash on call supersedes the original contract of subscription.⁴

After the company is organized, the subscriptions may be conditional, and the company can only enforce the subscription on its terms. Thus if the subscription is made on condition that the calls shall be paid in materials, the company cannot demand cash payments.⁵

¹ Hanover Junction, etc., R. R. v. Haldeman, 82 Pa. 36 (1876).

² Phila. & West Chester R. R. Co. v. Hickman, 28 Pa. 318 (1857).

³ McClure v. People's Freight Ry. Co., 90 Pa. 269 (1879).

⁴ Pittsburgh & Connellsville R. R. Co. v. Stewart, 41 Pa. 54 (1861).

⁵ Pittsburgh & Connellsville R. R. Co. v. Stewart, 41 Pa. 54 (1861).

Condition as to Grading.

16. A condition in a subscription to the stock of a proposed railroad, that no assessments shall be made unless for work actually done in grading, is not contrary to public policy.¹

Illegal Conditions of Subscription.

17. The directors of a railroad company have no authority to adopt illegal conditions of subscription, or relieve subscribers from the payment of installments due on subscriptions.

In *Bedford R. R. Co. v. Bowser*, STRONG, J., said: "The directors of the company then in office were its agents with limited powers, the extent of which the defendant was bound to know. Their duties were to conduct its affairs to the furtherance of the ends for which the company was created. They had no power to destroy it, to give away its funds, or to deprive it of any of its means to accomplish the full purpose for which it was chartered. The creditors were not the only persons who had interests and rights at stake. The stockholders who had paid their subscriptions, or bought their stock, and the commonwealth by whom the charter had been granted, were at least equally interested. The railroad was unfinished, and the commonwealth had a right to demand that all the resources, rights, and credits of the company should be devoted to its completion. An unfinished road was useless to the remaining stockholders, and it was a wrong to them to render their stock valueless, by extinguishing that which was necessary, and which should have been applied to the object for which the legislature gave the company its being. Directors of a railroad company are trustees for all the stockholders, and, in a very just sense,

¹ *People's Freight Ry. v. Hench*, 2 Walker, 478 (1883).

for the commonwealth. It is an abuse of their trust, wholly unauthorized, and at war with the design of the charter, to single out some of the stock subscribers and release them from their liability. No such authority in them has ever been recognized."¹

Secret Conditions or Agreements.

18. A subscriber will not be permitted to set up as a defense to his subscription a secret arrangement with the agents by which he was to be released from the payment of his subscription whilst the other subscribers continued to be bound. Thus, in an action on a subscription for stock, the defendant will not be permitted to prove that the subscription-book was brought to him by three officers of the company who induced him to subscribe by representing that the road should be built, not as stated in the book, but past the defendant's house, and, further, that he would not be obliged to pay until the road was so built. The court said: "Had he expressed in writing on the subscription-book the condition proposed to be proved, it would have been fair notice to his fellow-subscribers that his subscription amounted to nothing; was, in fact, a mere sham, since the condition, opposed, as it was, not only to the express action of the company, but to the condition involved in every other subscription, could not possibly be enforced. Now, as we have already shown, this subscription was especially designed to carry out a common adventure in which the company was but a means used for its accomplishment, and the interests of which were but secondary, hence it follows that if Miller succeeded in avoiding his obligation, he does so at the expense of his co-subscribers and in fraud of their rights. Every one who signed after him did so on the faith of

¹ 48 Pa. 29 (1864).

his signature, as he did upon the faith of the signatures of those who preceded him, and to permit him now to set up a secret parol arrangement by which he may be released whilst his fellows continue to be bound would be anything but just. As we said in the case of *Graff v. R. R. Co.*, 31 Pa. 489 (per WOODWARD, J.): 'A subscription to a joint stock is not only an undertaking to the company, but with all other subscribers. Such contracts are trilateral, and even if fraudulent as between two of the parties, they are to be enforced for the benefit of the third.' This quotation expresses a principle applicable to the case in hand, and aptly illustrates the reason why the defendant should be estopped from setting up the secret parol agreement between himself and the agents of the company."¹

One who has subscribed to the stock of a railroad company cannot defend to a suit on the subscription, that the subscription was made at the request of the president of the company on the understanding that the defendant was not to pay for the stock or hold it. Such an agreement would be a fraud upon the company.²

Unauthorized Delivery of Subscription Paper to Company.

19. A subscriber may show that the agent of the company who procured his subscription agreed to hold it until he should authorize its delivery to the company, and that a person not a director obtained the paper to look at, and without consent of the agent or defendant delivered it to the company.³

Opportunity to Inspect Subscription Paper in Final Form.

20. If a subscription is made upon a blank sheet of paper under a stipulation that it should not be binding

¹ *Miller v. Hanover Junction & Susquehanna R. R.*, 87 Pa. 95 (1878).

² *Robinson v. Pittsburgh & Connellsville R. R. Co.*, 32 Pa. 334 (1858).

³ *Cass v. Pittsburgh, Virginia & Charleston Ry. Co.*, 89 Pa. 31 (1876).

or be attached to the heading, which contained the terms of the association, until the subscriber had inspected and approved of that instrument, the subscription is not binding until the subscriber has had the opportunity of inspection for which he stipulated.¹

Bonus on Stock Subscriptions.

21. In the absence of legislative authority the directors of a railroad company have no authority to enter into an agreement on behalf of the company to pay a bonus for stock subscriptions, or to pay interest on the stock. If the directors enter into such an agreement the company is not bound.²

Payment of Interest on Stock.

22. Where the subscription is on a guarantee that the company will pay interest on stock "as soon as paid" until the road is finished, interest on the stock does not accrue until the stock is fully paid.³

Fraudulent Subscription.

23. A subscriber cannot set up as a defense that his subscription was a feigned and fraudulent one.⁴

Consolidated Companies.

24. A subscription to the stock of a corporation formed from the consolidation of three other companies is valid although made before the agreement for consolidation was filed in the office of the secretary of the commonwealth.⁵

¹ *Bocher v. Dillsburg & Mechanicsburg R. R.*, 2 Leg. Chron. Rep. 219 (1874); 76 Pa. 306 (1874).

² *Pittsburgh & Steubenville R. R. v. Allegheny Co.*, 79 Pa. 210 (1875).

³ *Miller v. Pittsburgh & Connellsville R. R. Co.*, 40 Pa. 237 (1861).

⁴ *Graff v. Pittsburgh & Steubenville R. R. Co.*, 31 Pa. 489 (1858).

⁵ *McClure v. People's Freight Ry. Co.*, 90 Pa. 269 (1879).

Right of Consolidated Company to Enforce Subscription to Stock of Original Companies.

25. A railroad company consolidated by the union of two other companies under the authority of an act which provided that all the property and debts due to the original companies shall be transferred to the consolidated company, has the right to enforce the collection of the stock subscribed for one of the original companies.¹

Duties of Commissioners.

26. The commissioners to take subscriptions have no priority of right over other persons, and no subscriptions can be lawfully taken with closed doors.²

Number of Persons who may Subscribe.

27. The commissioners have a right to make a rule that no person should have the privilege of subscribing for more than a certain number of shares of stock on the first day. The Act of 1849 does not contemplate that either the commissioners or any other person shall obtain possession of the whole stock or even a majority of it. The companies contemplated by the act were to be corporations aggregate, not sole. It could not have escaped the view of the legislature that the usefulness of such companies was likely to be greatly enhanced by enlisting in their behalf the interest of many individuals.³

Assignment of Unpaid Installments.

28. An assignment by a railroad company to an indorser of the unpaid installments or balances due on subscriptions to the capital stock of the railroad company,

¹ *Hamilton v. Clarion, Mahoning & Pittsburgh R. R.*, 144 Pa. 34 (1891).

² *Brown v. Second & Third Streets Passenger Ry.*, 3 Phila. 161 (1858).

³ *Brown v. Second & Third Streets Passenger Ry.*, 3 Phila. 161 (1858).

as an indemnity against loss by reason of his indorsement, is not an assignment for the benefit of creditors.¹

Partial Payment Required by Acts of 1849 and 1868.

29. The payment of \$5 per share at the time of subscribing as provided by the Act of Feb. 19, 1849, is not satisfied by giving a note for the subscription, and such a subscriber, who has taken no other part in the affairs of the company is not estopped from setting up the invalidity of his subscription.²

It seems that there can be no valid subscription to the stock of a company incorporated under the Act of April 4, 1868, P. L. 62, without the payment by each subscriber of ten per cent. on the amount subscribed, whether the subscription is made before or after the incorporation of the company.³

Waiver of Conditions.

30. Officiating as a judge of an election of a railroad company is a waiver of any alleged condition attached to the subscription for company's stock, and renders such subscription absolute.⁴

If a subscriber, after he has been released from his subscription, takes an active part in the management of the company, as by voting, acting as director, and paying

¹ *Mellbroom's Ap.*, 44 Pa. 92 (1862).

² *Boyd v. Peach Bottom Ry.*, 90 Pa. 169 (1879).

³ *Bacher v. Dillsburg & Mechanicsburg R. R.*, 76 Pa. 306 (1874).

The Act of April 11, 1848, incorporating the West Chester & Phila. Railroad Company provides for the appointment of commissioners to receive subscriptions for stock; but it was provided that "no subscription shall be valid unless the person so subscribing shall pay to the said commissioners at the time of making the same, the sum of \$5 on each and every share, for the use of the company." It was held that the proviso applied only to subscriptions received by the commissioners before the organization of the company: *Phila. & West Chester R. R. Co. v. Hickman*, 28 Pa. 318 (1857).

⁴ *Pittsburgh & Steubenville R. R. v. Proudfit*, 2 Pittsb. Rep. 85 (1860).

money to the company, he will be held to have re-assumed his original obligation.¹

Revocation of Subscription.

31. Until the articles of association are filed a subscriber has the right to withdraw his name. If he does not care to pay the ten per cent. subscription required by law he should withdraw before the articles are filed. The important period in the transaction is when the association is ready to file their articles in the office of the secretary of the commonwealth. Until this time the whole scheme is inchoate, and the subscriber may withdraw. But when he suffers his name to remain and the articles to be filed and organization of the corporation to become complete he is in a different position. His subscription is there fully set out and his obligation final. He cannot then be permitted to set up his own omission of duty against his associates. He had his *locus penitentiae* and suffered it to pass from him. In the absence of an express provision of law required of the original subscribers after the organization, it seems that an original subscriber ought not to be permitted to escape from his contract which he suffered to ripen into a finality by permitting his name to remain until organization became complete, on its faith.²

A person who has been active in obtaining subscriptions for a railroad company, and has received a subscription-book in which he has written his own name, cannot by cutting his name out of the book before returning it to the company revoke his subscription.³

¹ Pittsburgh & Connellsville R. R. Co. v. Stewart, 41 Pa. 54 (1861); Hanover Junction, etc., R. R. v. Haldeman, 82 Pa. 36 (1876).

² Garrett v. Dillsburg & Mechanicsburg R. R. Co., 78 Pa. 465 (1875).

³ Greer v. Chartiers Ry., 96 Pa. 391 (1880).

Ratification.

32. In order to make a valid ratification of a stock subscription for which a person is not legally bound the party must have a full knowledge of all the circumstances attending the transaction, and especially must know that he would not be bound without such ratification.¹

Ratification of a subscription may be inferred from the subsequent execution of a letter of attorney constituting a proxy by the person in whose name the subscription was made.²

Estoppel.

33. If a person admits that he is a subscriber, and other persons have acted on the faith of such admission, he is estopped from denying his subscription.³

A subscriber who actively participates in the affairs of the company, by voting at stockholders' meeting, acting as a director of the company, making payments of installments in answers to calls voted for himself, and by certifying himself as an original subscriber, or permitting such certificate, in order to obtain a subscription from a municipality, is estopped to deny that he is a subscriber.⁴

Where, after subscriptions to a railroad company have been obtained, an Act of Assembly is passed reducing the amount of subscriptions required, an original subscriber will not be released if he participates in the organization of the company and votes at the corporate meetings.⁵

¹ *Pittsburgh & Steubenville R. R. Co. v. Gazzam*, 32 Pa. 340 (1858).

² *McCully v. Pittsburgh & Connellsville R. R. Co.*, 32 Pa. 25 (1858).

³ *Graff v. Pittsburgh & Steubenville R. R. Co.*, 31 Pa. 489 (1858).

⁴ *Hays v. Pittsburgh & Steubenville R. R. Co.*, 38 Pa. 81 (1860).

⁵ *Bedford R. R. v. Bowser*, 43 Pa. 29 (1864).

Effect of Abandonment of Road.

34. A subscription to the capital stock of a railroad company is avoided by the abandonment of the road by the company.¹

Where no call is made on a stock subscription for more than six years from the date of the subscription, the law will presume an abandonment of the undertaking, and from analogy to the statute, bar the recovery of the subscription. "The company were bound to demand payment of the subscription," said WOODWARD, J., in *Pittsburgh & Connellsville R. R. Co. v. Byers*,² "within six years from its date, or, at least, to call in an installment within that period. And thus, in strict analogy to the statute; for whether the demand be an essential preliminary to the action or not, it is beyond question, one of the remedies given to the company upon the contract. The statute in terms bars only the action. But, we ground a presumption on the statute that a party who did not employ the other means afforded for enforcing the contract within the period of the statute, meant to abandon the contract. After that period, demand could not be made with effect. If, therefore, an action would not lie without previous demand, and the time for that is gone, the action is gone."

If the company refuses some of the subscriptions and abandons the undertaking, it cannot recover subscriptions from the other subscribers. But a subscriber may consent to the refunding to some subscribers and to the delay in commencing operations. In such a case he is estopped from setting up these matters as a defense to an action on the subscription. In *McCully v. Pittsburgh & Connellsville R. R. Co.*,³ WOODWARD, J., said: "McCully's under-

¹ *Delaware River & Lancaster R. R. v. Rowland*, 9 Atl. Rep. 929 (1887).

² 82 Pa. 22 (1858).

³ 82 Pa. 25 (1858).

taking was not only to the company, but with the other subscribers. His subscription and theirs were mutual considerations for each other, and to let them off and hold him, is to enforce a contract he never made. He has a right to insist that the company shall perform its charter duties in the time and manner prescribed, and that other subscriptions shall be enforced in the same manner as his own. And when the company let off part of its subscribers and returned them their money, without the consent of the defendant, actual or implied, they discharged him from all liability growing out of his original subscription. . . . If there was evidence that McCully consented to the discharge of other subscribers, and the delay of commencing the road, as matters of corporate policy, which were not to affect his liability as a stock subscriber, he is estopped now from alleging these matters in defense."

Unlawful Act of Directors not a Defense.

35. If a person subscribes without condition to the stock of a railroad company, he does so in view of the general powers conferred upon the company, and he is responsible with the other incorporators for the proper and lawful exercise of such powers. He cannot, therefore, set up an unlawful act of the directors as an excuse for the non-payment of his subscription; for it is within his own power to prevent such abuse of authority.¹

The violation of a charter of incorporation cannot be made subject of judicial investigation in a collateral suit. Thus the fact that a railroad company was guilty of an act which might work a forfeiture of its charter, is not a matter of defense to an action brought by the company upon a subscription to its capital stock.²

¹ *Caley v. Philadelphia & Chester County R. R.*, 80 Pa. 363 (1876).

² *Hanover Junction etc., R. R. v. Haldman*, 82 Pa. 36 (1876).

Release of Part of Claim.

36. A railroad company may in the collection of subscriptions, if it is found necessary in order to secure a part of a doubtful claim, release a part for the purpose of securing the residue.¹

Off-Set.

37. A subscriber to the stock of a railroad company to an amount greater than a debt by the railroad company to himself, cannot ask the payment of such debt in the distribution of the proceeds of a sheriff's sale of the property and franchises of the road on a judgment of another creditor.²

Invalidity of Charter.

38. The alleged invalidity of a corporation under its charter cannot be set up as a defense to an action for installments on stock.³

* A person who participated in the organization of a street railway company, and acted as a director of the company, cannot set up the unconstitutionality of the act under which the company was chartered, as a defense to the payment of his stock subscription. He cannot deny the rightful existence of the company as to himself and his own stock subscription, which he has affirmed as to all others.⁴

Alteration of Charter.

39. A mere alteration in the charter giving the company the right to extend its road, is not such a change as will invalidate the contract of subscription.⁵

¹ Phila. & West Chester R. R. Co. v. Hickman, 28 Pa. 318 (1857).

² Hogg's Ap., 88 Pa. 195 (1878).

³ Kern v. People's Freight Ry., 2 W. N. C. 718 (1876).

⁴ Weinman v. Wilkinsburg & East Liberty Pass. Ry., 118 Pa. 192 (1888).

⁵ Cross v. Peach Bottom Ry. Co., 90 Pa. 392 (1879).

But the subscription will be invalidated if it appears that a supplementary act was procured changing the name of the company, and diverting it from its original object in order to perpetrate a fraud upon the subscribers. Thus a company was incorporated for the purpose of manufacturing and mining with the incidental right to build a railroad for purely private purposes. The name of the company was the "Caledonian Iron Works." Subsequently two persons obtained control of the charter, and procured the passage of a supplemental act by which the name of the company was changed to the "Southern Pennsylvania Iron & Railroad Company," and authority was given to purchase and cancel the original stock of the company, and it was also given the powers of a general transportation company. It was held that a subscriber to the original company was not liable for his subscription.¹

Rights of Creditors to Enforce Subscriptions.

40. Creditors of a corporation may maintain a bill in equity against the corporation and the subscribers to its stock to ascertain the plaintiff's claims and for the appointment of a receiver to collect unpaid stock subscriptions.²

If a subscriber contracts to construct a portion of the railroad and to receive therefor either stock or transportation notes, and the property of the road is subsequently sold, they are not entitled to anything from the proceeds of the sale until the general creditors of the company are paid in full.³

Forfeiture of Stock.

41. A railroad company, in enforcing the payment of calls by forfeiture of the stock, must strictly pursue the

¹ *Southern Pennsylvania Iron & R. R. v. Stevens*, 87 Pa. 190 (1878).

² *Bailey v. Pittsburgh Coal R. R.*, 139 Pa. 213 (1891).

³ *Hart's Ap.*, 90 Pa. 355 (1881).

mode pointed out in its charter and the general laws of the State.

Under the general railroad act stock may be forfeited six months after a default in the payment of a renewed note for stock subscription. In such a case the court said: "The second acceptance or note, as renewed, became payable on November 2, 1871. The sale was made of the stock on the 15th day of May, 1872, more than the required six months having elapsed since the renewed note became due, and the plaintiff was in default. We are not clear, however, that the taking of plaintiff's acceptances extended the time beyond the 1st day of September, 1871, from which the six months of default were to be reckoned. If this company was made up of a large company of stockholders it might be proper to discuss the power of a board of directors to exact money in payment of assessments from the body of the stockholders and favor others by taking their obligations and extending the payment of them from time to time. We have not met any decision on the exact point, but the general current of authority throws a strong doubt on the powers of the directors of a corporation to make any discrimination between the stockholders. They cannot accept from shareholders a sum of money in discharge of his liability to calls: 27 Eng. L. Eq. R. 575. Directors are agents with limited powers. All subscribers to the stock must stand on an equality. These points have been frequently decided. The discretion of the managers as to calls are modal, merely relating to the time and manner of making payments: *Ger. Pass. Ry. Co. v. Fidler*, 60 Pa. 132. It is not necessary to pursue this question. Here the number of stockholders is limited, and the taking of plaintiff's paper and the extension of the time of payment were done with the consent of all."¹

¹ *Witte v. People's Pass. Ry.*, 5 Leg. Gaz. 273; a. c. 1 Leg. Chron. Rep. 252 (1871).

Remedy.

42. Assumpsit lies for an unpaid stock subscription.¹

In an action to recover unpaid installments of stock subscription it is proper to permit an amendment of a declaration after an appeal from an award of arbitrators, laying the contract of subscription to have been made with the commissioners, instead of with the company.²

Calls.

43. Suit cannot be brought for a subscription to stock before a call is made, and notice of such call to the stockholders must be shown.³

If calls have been made before the company makes an assignment for the benefit of creditors, the assignee has power to collect the unpaid subscriptions.⁴

A subscriber may waive notice of calls by a distinct and unequivocal repudiation of his subscription. After such repudiation it is no longer necessary to give him notice of the calls.⁵

A valid call may be made by the treasurer of the company under general authority given by the board of directors, although the resolution does not fix the amount of the call as shown by the minutes.⁶

The penalty for non-payment of calls continues to run after the institution of the suit, and there is no limitation of time prescribed by the act within which the penalty must be sued for.⁷

¹ *Bavington v. Pittsburgh & Steubenville R. R. Co.*, 34 Pa. 358 (1859).

² *Everhart v. Phila. & West Chester R. R. Co.*, 28 Pa. 339 (1857).

³ *McCarty v. Selinsgrove & North Branch R. R.*, 87 Pa. 332 (1878).

⁴ *West Chester & Philadelphia R. R. v. Thomas*, 2 Phila. 344 (1857).

⁵ *Cass v. Pittsburgh, Virginia & Charleston Ry. Co.*, 80 Pa. 31 (1876).

⁶ *Hays v. Pittsburgh & Steubenville R. R. Co.*, 38 Pa. 81 (1860).

⁷ *Bavington v. Pittsburgh & Steubenville R. R. Co.*, 34 Pa. 358 (1859).

Substitution of Liability.

44. Where a firm of which a subscriber is a member is substituted in the subscriber's place, it must pay the subscriptions.

Sutton was a member of the firm of Weinman & Co., and also the promoter of a street railway company, and a subscriber to twenty shares of its capital stock. He was also a member of the first board of directors. Soon after the organization of the company Sutton, being about to remove from the city, took his partner, Weinman, with him to a meeting of the board of directors, and desired that the firm should be accepted in lieu of himself as a subscriber for the twenty shares of stock standing in his name; and that his partner, Weinman, should be permitted to take his place in the board. The resignation of Sutton and the election of Weinman as a director in his stead then took place, and were duly entered upon the minutes. Thereafter Weinman took upon himself the duties of a director, attended and took part in the meetings of the board, and among other things favored the collection of the subscriptions to the capital stock of the company. When called upon to pay on the shares by virtue of the ownership of which he was made a director, he objected that no formal written undertaking had ever been made by Weinman & Co. for the payment of Sutton's subscription, and because no transfer of the shares was made by Sutton to the firm upon the books of the company. It was held that the firm was responsible.¹

Statute of Limitations.

45. Six years bars the right of a railroad company to recover a subscription to stock, if no call has been made

¹ Weinman v. Wilkensburg & East Liberty Pass. Ry., 118 Pa. 192 (1888).

within that time. If the subscription is a conditional one, it will be barred unless the condition is performed, and a call made within six years.¹

Where a person holds the subscription-book for over six years after his subscription was entered, and then delivered the book to the company, the statute of limitations will not begin to run until the delivery of the book.²

¹ *Pittsburgh & Connellsville R. R. v. Graham*, 2 Grant, 259 (1859); 36 Pa. 77.

² *Pittsburgh & Connellsville R. R. Co. v. Plummer*, 37 Pa. 413 (1860).

CHAPTER III.

MUNICIPAL SUBSCRIPTIONS.

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|---------------------------------------|------------------------------------|
| 46. Legislative Authority Necessary. | 50. Use of Dividends to Establish |
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Legislative Authority Necessary.

46. The legislature may authorize a municipal corporation to subscribe for the stock of a railroad company, provided the municipality has a special interest in the railroad contemplated. In *Sharpless v. Mayor of Philadelphia*, BLACK, C. J., said: "A railroad is a public highway for the public benefit, and the right of a corporation to exact a uniform, reasonable, stipulated toll from those who pass over it does not make its main use a private one. The public has an interest in such a road, when it belongs to a corporation, as clearly as they would have if it were free, or as if the tolls were payable to the State, because travel and transportation are cheapened by it to a degree far exceeding all the tolls and charges of every kind, and this advantage the public has over and above those of rapidity, comfort, convenience, increase of trade, opening of markets, and other means of rewarding labor and promoting wealth. . . .

"It being the duty of the State to make such public

improvements, if she happen to be unable or unwilling to perform it herself to the full extent desired, she may accept the voluntary assistance of an individual, or a number of individuals associated together and incorporated into a company. The company may be private, but the work they are to do is a public duty; and along with the public duty there is delegated a sufficient share of the sovereign power to perform it. The right of eminent domain is always given to such corporations. But the right of eminent domain cannot be used for private purposes; and therefore if a railroad, canal, or turnpike, when made by a corporation, is a mere private enterprise, like the building of a tavern, store, mill, or blacksmith's shop, there never was a constitutional charter given to an improvement company, and every taking of land or materials under any of them was a flagrant trespass.

"If the making of a railroad is a public duty, which the State may either do entirely at the public expense, or cause to be done entirely by a private corporation, it follows that such work may be made partly by the State, and partly by a corporation, and the people may be taxed for a share of it, as rightfully as for the whole. The corporation may be aided by an exertion of the taxing power, as well as with the right of eminent domain. Accordingly we find that from the earliest times the commonwealth has subscribed to the stock of such corporations, and paid over the money to them in pursuance of laws which no one ever doubted to be constitutional. Many millions of the State debt have been created in that way.

"Now, if the legislature may create a debt and lay taxes on the whole people to pay for such subscriptions, may they not, with more justice and greater propriety, and with as clear a constitutional a right, allow a particular

portion of the people to tax themselves to promote in a similar manner a public work, in which they have a special interest? I think this question cannot be answered in the negative. It will surely not be pretended that all taxes are unconstitutional, which are not laid by the State directly, which are not general, or which do not go into the State treasury. If this could be maintained it would make our general road law unconstitutional from beginning to end. Counties and townships have always had the right given to them, and the duty cast upon them, of erecting their own public buildings, and making their own roads. Local taxes for local purposes, and general taxes only for purposes which concern the whole State, are a vital principle of our political system, and there is no feature in it which has attracted more unqualified admiration from those who understand it best. Its justice is too obvious to need explanation. I cannot conceive of a reason for doubting that what the State may do in aid of a work of general utility, may be done by a county or city for a similar work which is especially useful to such county or city, provided the State refuses to do it herself, and permits it to be done by the local authorities.

“The city’s charter was granted by the legislature. It may be enlarged. The same power which gave them the privileges which they have may give them others. It cannot be so enlarged as to enable the corporate authorities to embark the city in a private business, or to make the people pay for a thing in which they have no interest. But within these limits there is nothing to prevent an indefinite extension of their corporate powers.

“But it is insisted that the right of a city or county to aid in the construction of public works must be confined to those works which are within the locality whose people

are to be taxed for them. The Water Gap Company stops its road north of Vine Street, outside of the city limits, and the Hempfield road has its eastern terminus at Greensburg, three hundred and forty-six miles west of Philadelphia. I have already said that it is the interest of the city which determines the right to tax her people. The interest does not necessarily depend on the mere location of the road. Therefore the location cannot be an infallible criterion. If the city cannot have an interest in a road which stops in the Northern Liberties, then Dock Ward can have no interest in one which terminates in Upper Delaware Ward, and all the subdivisions of the city which it does not actually enter may be exempted on the same score. A railroad may run through a county without doing its inhabitants the least service. May such a county assist to make it, while a city which it supplies with bread and whose trade is doubled by it must not do so, merely because it ends outside of an imaginary line that limits the corporate jurisdiction? It seems very plain that a city may have exactly the same interest in a road which terminates outside of her borders as if the depot were within them, and a great deal more than if it passed right through. If she has an interest in any part, she has probably an equal interest in every part. Railroads are generally made to connect important trading points with each other. The want of a link at one place breaks the desired connection as much as at another. Philadelphia has now a road in Greensburg. The Hempfield Company proposes to carry it on to Wheeling. I do not see that the city is not as much interested in the Hempfield road as she would be in making an independent road, starting at the corner of Schuylkill Fifth and Market Streets, and running by the way of Greensburg the whole distance to Wheeling.

“ But it is not our business to determine what amount of interest Philadelphia has in either of these improvements. That has been settled by her own officers, and by the legislature. For us it is enough to know that the city may have a public interest in them, and that there is not a palpable and clear absence of all possible interest perceptible by every mind at the first blush. All beyond that is a question of expediency, not of law, much less of constitutional law. We would certainly be exercising a novel jurisdiction, if we would listen to an appeal from the councils on a point of local policy, and we would be giving a novel judgment, too, if we would decide a statute to be unconstitutional because the corporate authorities of a city, in acting under it, mistook the true interest of their constituents.

“ We must take it for granted that the councils and the mayor have fairly represented the majority of their constituents. It may operate with great hardship on the minority, but in this country it is private affairs alone, and not public, that are exempt from the domination of majorities. It may be conceded that the power of piling up these enormous public burdens, either on the whole people, or on a portion of them, ought not to exist in any department of a free government ; and if our fathers had foreseen the fatal degeneracy of their sons, it can scarcely be doubted that some restriction on it would have been imposed. But we, the judges, cannot supply the omission.”¹

By an Act of Assembly a county was authorized to subscribe to the stock of a railroad company, to issue bonds with interest and deliver them to the company in payment for the stock ; the company was authorized to receive them on the terms of paying, to the county or its

¹21 Pa. 147 (1853).

creditors holding the bonds, interest equal to the interest on the bonds. It was decided that the legislature could grant to both the county and the railroad company, the power to make such a contract.¹

A city may, under authority of an act of the legislature, subscribe to the shares of a railroad company, and such subscription is not contrary to the constitutional right of the citizens to be exempt from taxation except by their representatives.²

Power to Issue Bonds to Pay for Stock.

47. A municipal corporation which has authority to subscribe for the stock of a railroad company has also authority to issue bonds to pay for such stock.

In *Com. v. Pittsburgh, ex rel. Runboth*, STRONG, J., said: "It is finally contended, that if there was authority to make the subscription, there was none to issue bonds in payment. The language of the Act of 1837 is, 'any incorporated company, city, or borough shall have authority to subscribe thereto as fully as any individual.' Now, power to subscribe was power to create indebtedness. The creation of a debt was clearly contemplated. If not, why did the supplement of 1852 remove the disability to create a debt by subscription, which was thought to have been imposed by former acts? And if authority was given to the city to incur a debt by subscription, necessarily it included authority to give the creditor the usual evidences of a debt. Who would doubt that a power to borrow money carried with it a right to give a bond or note to the lender? It is a necessary incident, without which the power is worthless, and in every grant, whether it be of property, of a franchise, or of a

¹ *Pittsburgh & Connellsville R. R. v. Allegheny County*, 63 Pa. 126 (1869).

² *Riddle v. Philadelphia & Northwestern R. R.*, 1 Pitts. Rep. 158 (1854).

power, there is included everything necessary for its enjoyment. This is as true of grants to corporations as of those to natural persons. Grants to corporations are, indeed, strictly construed in favor of the public. This is a rule to be invoked when we are seeking for what has been given. It may be a reason for holding that an authority has not been conferred upon a corporation if the words of the gift are not clear and unambiguous, but none at all for stripping a power given of its natural and usual incidents. A power actually conferred is not the less because held by a corporation. And this admitted principle is held for the benefit of the public, not of the corporate body. It would be a perversion of its design to allow it to be used by a corporation to defraud its creditors, or to protect itself against its own assumed obligations.

"The obvious purpose which the legislature had in view in granting the city of Pittsburgh the right to take stock was to further the enterprise of building the railroad by providing a possible increase of means. This purpose would not have been accomplished by a barren grant of a right to subscribe without the power to give such securities for the debt created as could be made available. The city was authorized to subscribe 'as fully as an individual,' a natural person. Now after the organization of the company a natural person might have made a subscription, payable with his own bond or note, if the company had agreed thereto. When, therefore, the legislature conferred upon the city a power as large as that which a natural person possesses, it is evident that they gave in it power to give any securities for the debt which such a person might have given.

"There is another course of argument which may be very briefly stated, and which leads to the same conclusion. The power to execute and issue bonds, contracts, or other

certificates of indebtedness belongs to all corporations, public as well as private, and is inseparable from their existence. It is for this that they hold a common seal. No one would doubt that for a legal and authorized debt a municipal corporation might give its bond under its general corporate powers. If a bond given by such an obligor be void it is not because of the form of the instrument nor because general corporate powers do not warrant giving bonds but because the debt for which the bond has been given was created without authority, against law, or without law. A municipal bond for a subscription to the stock of a railroad company is ordinarily invalid, because such a subscription is outside of the powers of a municipal corporation. But when, as in this case, the legislature has authorized the subscription, and when, therefore, it has been made in the legitimate exercise of power conferred, it becomes a debt like any other, and may be secured and evidenced in the same way. Then it is unnecessary for the legislature to declare that bonds may be given for it, for the power to give bonds was conferred by the charter itself.

"We are of opinion, therefore, that the city of Pittsburgh had the power to make the subscription which was made to the capital stock of the Allegheny Valley Railroad Company, and that the bonds issued by the city were lawfully issued."¹

County Bonds Issued for Stock.

48. A county whose bonds have been sold below par in violation of the statute authorizing their issue may by proceedings in equity compel the holder to receive in satisfaction of the bonds the sum paid by the first purchaser with interest thereon.

¹ 41 Pa. 278 (1861); *Adams v. Lawrence Co.*, 2 Pitts. R. 60 (1859).

In *Armstrong Co. v. Brinton*,¹ WOODWARD, C. J., said :
“ In *Thomas’s Case*, 32 Pa. 230, we intimated that when a county found itself pursued by the holders of county bonds, issued for the stock of insolvent railroad companies, and sold at ruinous rates in violation of the statute which authorized the bonds to be issued, the true and honest course for the county was, not to repudiate the debt, but to bring the purchasers of the bonds into a court of equity, and compel them to receive in satisfaction of their bonds what had been actually paid for them. In the case of *Diamond v. Lawrence County*, 1 Wright, 358, we repeated, amplified, and defended the above suggestion, but we alluded to the fact that no county had yet thought fit to act upon it. At last a county has brought a bondholder into equity in pursuance of our suggestion.

“ Bonds like these are of modern invention, and when counties and towns were decoyed into the use of them for purposes of railroad corporations they had to obtain enabling statutes before they could prostitute municipal seals to any such purpose. And as soon as the people began to feel the consequences of applying the fundamental principle of commercial paper to their bonds they altered their organic law so as to render such bonds and enabling statutes impossibilities in the future. This class of securities, therefore, are not going to enter into the general commerce of the world. They are thrown off in a spasmodic action of the public mind, and courts of justice will have to deal with only so many as were issued whilst the spasm lasted. Why should we insist on applying the commercial law to such anomolous, temporary, ill-judged, and unwholesome securities? Is it from tenderness toward innocent purchasers? We have on this record a purchaser at sixty-three per cent. discount, as innocent as

¹ 47 Pa. 367 (1864).

most speculators in such bonds, and how did he buy? The notice of July 13, 1858, was very unskillfully drawn, but still it was enough to put Mr. Brinton upon inquiry into the source and origin of the bonds, and if it would not have led him to the truth there was the whole statute plainly referred to on the very face of the bonds themselves, which told him they were not to be sold under par. It is in vain to say that the rule of the statute was inapplicable to the bonds, for without statute the bonds had no lawful existence or value. Mr. Brinton took them, necessarily, under and by virtue of the statute, and therefore he took them with notice of the condition that the company had no right to part with them at less than their par value. No fictitious presumptions and intendments ought to prevail against the plain truth of the transaction. The defendant knew that he was buying a statutory security at a rate which the statute forbade. Had he gone into the market and bought commercial paper he could not have been affected with similar notice, for commercial paper is not issued under the sanction of statutes, but according to the demands of business."

If the law authorizing the issue of county bonds provides that they shall not be sold by the railroad company below par, and the company violates the act, the county is entitled to have its contract of subscription rescinded and the restitution of the bonds or the full value of them.¹

Although the county bonds issued in payment of stock held by the county have been sold below par in violation of the act, the county must provide for the accruing interest on them.²

A county was authorized to subscribe for stock in a railroad company and to pay for it in the bonds of the

¹ *Lawrence County v. North-Western R. R. Co.*, 32 Pa. 144 (1858).

² *Com. v. Allegheny County Commissioners*, 32 Pa. 218 (1858).

county. The county was to make provision for the payment of interest as on other bonds, and the railroad company was to receive the bonds at par as cash. It was held that the act required the county to pay the interest on the bonds.¹

Where county bonds are issued in payment of stock of a railroad company, under an act prohibiting the bonds from being sold at less than par, they are invalid if the company increases the stipulated prices for the work of their contractors by thirty-six per cent. and pay the contractors in bonds at par.²

A contractor who has agreed to take county bonds in payment for his work in constructing a railroad and who has notice of the facts that render the bonds invalid, has no standing in equity to prevent an injunction issuing to prevent the bonds from being negotiated, and a decree for their cancellation.³

If two counties each subscribe to the stock of a railroad company whose line passes through their territory, on the same terms, and about the same time, they are not jointly liable, and are not bound to contribute to each other's losses.⁴

Duties of Commissioners and Grand Jury.

49. An act authorizing a county to subscribe for the capital stock of a railroad company provided that "all such subscriptions shall be made by the county commissioners of the county subscribing, and shall be made by them after and not before the amount of said subscription shall have been designated, advised, and recommended by a grand jury of said county or counties." The grand

¹ Pittsburgh & Steubenville R. R. v. Allegheny Co., 79 Pa. 210 (1875).

² Lawrence County's Ap., 67 Pa. 87 (1870).

³ Mercer County v. Pittsburgh & Erie R. R. Co., 27 Pa. 389 (1856).

⁴ Lawrence County's Ap., 67 Pa. 87 (1870).

jury made a presentment recommending the commissioners to subscribe to said stock to an amount not exceeding \$150,000. The commissioners subscribed \$150,000, and executed and delivered bonds for the amount to the company. The court held that it was the imperative duty of the grand jury to fix the amount of the subscription, that they could not delegate this duty to the commissioners, and that the subscription was void. LEWIS, C. J., said: "It is impossible to read the Act of May 4, 1852, without perceiving that all discretionary power touching the subscription to the stock was given exclusively to the grand jury. They were directed to 'designate the amount of the subscription to be made,' and when they did not designate the amount, and 'advise and recommend' the subscription, it was imperative upon the commissioner to obey. The language of the act is that the subscription 'shall be made' by the county commissioners. The mandate is repeated in the clause declaring that the subscription shall be made after 'the grand jury have designated, advised, and recommended' the amount. It is indicated in the express prohibition of any subscription before the amount is so designated by the grand jury. It is plainly proclaimed in the preliminary clause declaring that the subscription shall be made subject to the 'restrictions, limitations, and conditions' specified in the act, 'and in no other manner or way whatever'—a command and not merely an authority—is manifest from what has already been said. The 'advice and recommendation' of the grand jury was to be regarded as an order which the commissioners were not at liberty to disobey. This is the plain meaning of the act. It breathes through every word, and speaks out in every line. As if to leave not a particle of doubt on this question, the legislature, in a subsequent part of the act, speak of the amount of such

subscription as 'ordered and designated as aforesaid.' It follows that the commissioners had no discretionary authority whatever in the matter; they were merely permitted to hold the pen, and to write precisely what they were directed by the grand jury to write. Nothing more—nothing less. We can readily see many good reasons for this. The commissioners are selected so long in advance of the decision to be made, that all persons who may be disposed to apply improper influences have abundant opportunities of doing so. They are but three in number, and two of these might decide the fate of the county. These two might lack the wisdom necessary for such an important measure. They might also lack the integrity required for such a high trust. It is not necessary to deal in ambiguous language when discussing such a subject. From the beginning of the world to the present time history has been teaching her lessons of human frailty, beguiled and corrupted by human wickedness. It is fair to presume that these lessons were not lost on the legislature. Although they could not distinctly see the wily serpent of corruption, the waving of the grass often indicated his stealthy course. It is therefore not improbable that one of the objects of the restrictions in the Act of 1852 was to guard against bribery. Whatever may have been the motive, the legislature were unwilling to place the fortunes of a whole county at the disposal of two county commissioners."¹

In 1852 the county commissioners of Philadelphia County had no power without the sanction of the county board to subscribe for the stock of the Sunbury & Erie Railroad Company, under the Act of July 10, 1852, authorizing the corporate and constituted authorities of

¹ *Mercer County v. Pittsburgh & Erie R. R.*, 27 Pa. 389 (1856); *Frick v. Mercer County*, 138 Pa. 523 (1891).

any municipal or other corporation to subscribe for the same.¹

The Act of April 14, 1852, authorized Allegheny County to subscribe to the stock of the Allegheny Valley Railroad Company. The act provided "before such subscription shall be made, the amount thereof shall be final and determined by one grand jury of the county, and upon the report of such grand jury being filed, it shall be lawful for the county commissioners to carry the same into effect by making in the name of the county the subscription so directed by the grand inquest." It was held that the fact that one grand jury requested the commissioners to subscribe 20,000 shares, and the commissioners subscribed only 15,000, did not invalidate the subscription.²

But where the act simply authorizes the county to subscribe an amount not exceeding 10,000 shares on the recommendation of the grand jury, and the jury recommends a subscription not exceeding 10,000 shares, the commissioners may make a valid subscription of 6,000 shares.³

A county subscription to stock is not invalid because it was urged upon the grand jury and county commissioners by the representatives of persons interested in the company. In *Lawrence County v. North-Western R. R. Co.*,⁴ LOWRIE, C. J., said: "Unquestionably, the authorities of Lawrence County ought to have chosen their own advisers, and ought not to have listened to the opinions and importunities of officious and interested volunteers. If they were cheated by relying on such opinions, we have no authority to relieve them. It might have been

¹ *Brown v. County Commissioners of Philadelphia County*, 21 Pa. 37 (1853).

² *Com. v. Perkins*, 43 Pa. 400 (1862).

³ *Com. v. Allegheny County Commissioners*, 32 Pa. 218 (1858).

⁴ 32 Pa. 144 (1858).

otherwise, if they had demanded information relative to the facts that were necessary in judging of the expediency of the proposed subscription, and had been falsely informed of them; but we do not discover that they sought any such information. They ought not to have relied, as a ground of their action, on the hopes expressed by the railroad officers."

Where an act authorizing a subscription provides that the acceptance of the act by the company shall also be deemed an acceptance of another act imposing certain restrictions upon the company, and the latter act is repealed after the grand jury has recommended the subscription, and before the company has accepted the subscription, the right to subscribe has ceased, and no subsequent acceptance by the company or subscription by the commissioners, is binding on the county.¹

Use of Dividends to Establish Steamship Company.

50. A municipal corporation which has subscribed to the stock of a railroad company has no authority in the absence of legislation authorizing it to apply the dividend due on the stock to the establishment of an ocean steamship company. In an interesting opinion in *Pennsylvania Railroad Co. v. Philadelphia*,² READ, J., said: "The Pennsylvania Railroad Company was incorporated under an Act of the 13th of April, 1846, and a subscription of its stock by the city of Philadelphia, in its then corporate name, became a subject of discussion in the councils of the corporation and amongst her citizens. A committee of councils obtained the opinion of Messrs. Thomas I. Wharton and T. M. Pettit, concurred in by Mr. John Sergeant, in favor of the authority of the corporation to subscribe to the stock of the railroad company, based

¹ *Mercer County v. Pittsburgh & Erie R. R. Co.*, 27 Pa. 389 (1856).

² 47 Pa. 189 (1864).

upon the general words of the preamble to the Act of March 11, 1789, incorporating the city, and of the power given by the 16th section to pass all such ordinances as 'shall be necessary or convenient for the government and welfare of the said city.' A contrary opinion, denying the authority of the city under its charters to subscribe to a railroad company, was given by Mr. Binney, accompanied by a very learned and elaborate argument which Mr. Wharton undertook to answer; an opinion to the same effect was given by the writer of this, who contended that the framing of the charters were intended to connect a railroad, a bank, a canal, or a turnpike with the corporation of the city. The question formed a turning-point at the October election, and the decision, being in favor of a subscription, the councils on November 12, 1846, authorized a subscription to the stock of the company, which, with other ordinances subsequently passed, made the city a stockholder to the amount of eight thousand shares, or \$4,000,000. The city was, however, not satisfied of its power under the charter to make the subscription, and an act was passed on March 27, 1848, validating it and giving authority to the municipal corporations in the county of Philadelphia to subscribe for shares in the capital stock of the railroad company. This was the whole extent of the authority conferred upon the city by the legislature.

"In 1853 the question of the constitutionality of similar Acts of Assembly, conferring similar authorities, was brought before this court and argued at great length by numerous counsel, and the result is to be found in *Sharpless v. The Mayor*, 9 Harris, 147, and *Moers v. City of Reading*, 9 Harris, 188. In these cases by brother STRONG and myself were concerned on the winning side. The decision in favor of the constitutionality of these acts

was by a bare majority of the court, and left no doubt that if the question had depended on the original charters of the cities of Philadelphia and Reading, unaided by special Acts of Assembly, the subscriptions to the stock of the respective railroad companies would have been declared to be entirely invalid. At the close of C. J. BLACK's opinion, as printed in the *Legal Intelligencer* of September 9, 1858, he uses this language: 'Equally and even more impossible would be the attempt to show that the case in *Brightly* had anything to do with it. There was then no Act of Assembly permitting the subscription. No lawyer doubts that a borough can only subscribe to a railroad when expressly authorized by law to do so.'

"It was therefore settled that the original subscription of the city to the Pennsylvania Railroad Company was invalid, but that it was confirmed and validated by the Act of 1848. The evil of these subscriptions by counties and municipal corporations were so aggravated that it became necessary to interfere and prevent by a constitutional prohibition all future pledges of municipal faith and property for such purposes under the sanction of the legislature who only possessed the power to grant the proper authority. Under direct legislative sanction the city of Philadelphia had five millions of valuable stock and five millions of utterly worthless stocks in various railroad companies, subscribed under a great outside pressure.

"The Constitution as amended provides that, 'the legislature shall not authorize any county, city, borough, township, or incorporated district by virtue of a vote of its citizens or otherwise, to become a stockholder in any company, association, or corporation, or to obtain money for, or loan its credit to any corporation, association, or party.'

"The Act of 1848 only authorized the city to subscribe to the stock of the Pennsylvania Railroad Company and to become a stockholder, but the stock thus obtained became municipal property. Here the authority ended, and as no other act was passed before the constitutional prohibition was made a part of the Constitution, all power to aid by credit or money in any shape, any other corporation, was taken away from a city which required previous legislative sanction to do the act. The simple question then is, can the city of Philadelphia devote its stocks, its money, or its credit to the aid of a steamship company, directly or indirectly, without the authority of a special Act of Assembly? The answer to it is perfectly plain that it cannot, and it is equally clear that the Constitution expressly forbids the passage of any such act, and the consequence is that the ordinance relating to the projected line of steamships from the city of Philadelphia to foreign ports is null and void, and of no effect whatever."

Waiver of Conditions.

51. If a municipal subscription to stock of a railroad company has been made on certain conditions precedent, the subsequent issue of bonds in payment of the stock raises a presumption that the conditions have been complied with or waived by the city.¹

Release of Subscriptions.

52. If the railroad company releases the private subscriptions to its stock, a municipal subscription is also released.²

¹ *Com. v. Pittsburgh*, 43 Pa. 391 (1862).

² *Crawford County v. Pittsburgh & Erie R. R. Co.*, 32 Pa. 141 (1858).

Effect of Change of Name, etc.

53. A municipal subscription to stock is not invalidated by a subsequent extension by the legislature of the time within which the railroad is to be built; nor of a mere change of name of the company, where in fact the corporation was the same, and had the same termini for its road.¹

Remedy.

54. Mandamus is the proper remedy to compel a municipal corporation to pay a subscription to the stock of a railroad company. In such a case the authority to make the subscription implies an obligation to make it, and where no special mode of doing so is provided, it is also implied that it is to be done in the ordinary way by the levy and collection of taxes.²

¹ *Com. v. Pittsburgh*, 41 Pa. 278 (1861).

² *Com. v. Perkins*, 43 Pa. 400 (1862).

CHAPTER IV.

STOCK.

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|--------------------------------------|-------------------------------------|
| 55. Stock is Personal Property. | 60. Increase of Capital Stock. |
| 56. Transfer of Stock. | 61. Conversion of Bonds into Stock. |
| 57. Interest on Installments. | 62. Dividends. |
| 58. Issue of Stock at Less than Par. | 63. Forfeiture of Stock. |
| 59. Preferred Stock. | |

Stock is Personal Property.

55. Stock of a railroad company is personal property, and accompanies the person of the owner.¹

Transfer of Stock.

56. A corporation as a trustee of its stockholders is bound to proper vigilance and care that they may not be injured by unauthorized transfers of their stock. If a blank power of transfer with genuine signature is presented thirteen years after the date of the transfer, the corporation is bound to make inquiry if the power has been revoked, and if it fails to do so, it is guilty of negligence, for which it may be held liable.²

If the owner of stock, after signing a blank transfer, intrusts it to an agent, who fraudulently transfers the stock to another person, who, in good faith, had it transferred to himself, the owner of the stock has been guilty

¹ *Huntsinger v. Philadelphia Coal Co.*, 11 Phila. 609 (1876).

² *Pennsylvania R. R. Co.'s Ap.*, 86 Pa. 80 (1878); *Willis v. Philadelphia, etc., Passenger Ry.*, 6 W. N. C. 461 (1879).

of negligence, and cannot recover from the corporation. In such a case the rule applies that where one of two innocent persons is to suffer from the tortious act of a third, he who gave the aggressor the means of doing the wrong must alone bear the consequences of the act.¹

A street railway is within the general railroad law of February 14, 1849, forbidding the transfer of shares so long as the holder is indebted to the company. The president of a street railway company fraudulently issued shares of the company in excess of the charter limits. Certain of these certificates standing in his own name he gave to the plaintiff, with a blank power of transfer. Plaintiff did not have the stock transferred to his own name, and in the meantime the president became heavily indebted to the company. It was held that plaintiff was not entitled to recover the shares or their value until the president's indebtedness to the company was paid.²

Interest on Installments.

57. Where a railroad company is authorized to build a railroad between two points named, and to pay interest on installments on stock, until the road shall be completed, interest is not payable after the road has been completed between the points designated, although it is contemplated to further extend the road.³

Issue of Stock at Less than Par.

58. A railroad company was authorized to sell its stock below par. The company gave the option to its stockholders "of taking *pro rata* for each share the sum of

¹ Pennsylvania R. R. Co.'s Ap., 86 Pa. 80 (1878).

² Mount Holly Paper Company's Ap., 99 Pa. 513 (1882).

³ Pittsburgh & Connellsville R. R. v. Allegheny County, 63 Pa. 126 (1869); Pittsburgh & Steubenville R. R. v. Allegheny County, 79 Pa. 210.

\$40 of the capital stock upon the payment of \$4 for each share of stock," and declared a dividend of seven per cent. per annum, payable quarterly. The increase of stock was \$1,000,000. It was held that the increase was not a stock dividend liable to taxation.¹

Stock in a railroad company issued at less than the par value is fraudulent, and a purchaser thereof is entitled to a rescission of his contract.²

Preferred Stock.

59. A corporation may issue new shares and give them a preference, as a mode of borrowing money, where it has power to borrow, as preferred stock is only a form of mortgage.³

An act provided that the holders of preferred stock authorized to be issued under the act should be entitled to receive a dividend of eight per cent. payable semi-annually in preference to any dividends upon the unpreferred stock. Seventeen years afterward other acts were passed authorizing the issue of consolidated preferred stock, into which both the preferred stock and common stock should be converted. All the holders of the preferred stock accepted the consolidated stock, except the owners of forty shares, who refused to take it. Subsequently a dividend of four per cent. was declared by the company. There had been no previous dividend. It was held that the holders of the forty-two shares of preferred stock were entitled to a dividend of eight per cent. per annum from the time that the preferred stock was issued, and that they could enforce their right by an action of assumpsit.⁴

¹ *Commonwealth v. Erie & Pittsburgh R. R.*, 74 Pa. 94 (1873).

² *Fosdick v. Sturges* 3 Phila. 312 (1858).

³ *West Chester & Phila. R. R. v. Jackson*, 77 Pa. 321 (1875).

⁴ *West Chester & Phila. R. R. v. Jackson*, 77 Pa. 321 (1875).

The acceptance of remedial legislation, such as authority to issue preferred stock to aid the company in financial embarrassment, is not such a radical change in the structure of the company or the objects of its institution as will relieve an original stockholder from his liability for installments on the shares subscribed by him. In *Everhart v. West Chester & Phila. R. R.*, **WOODWARD, J.**, said: "Nothing is plainer than an alteration of a charter by the legislature may be so extensive and radical as to work an entire dissolution of the contract entered into by a subscriber to the stock, as by procuring an amendment which superadds to the original undertaking an entirely new enterprise. Every individual owner of shares expects, and indeed stipulates with the other owners as a body corporate, to pay them his proportion of the expense which a majority may please to incur in the promotion of the particular objects of the corporation. By acquiring an interest in the corporation, therefore, he enters into an obligation with it in the nature of a special contract, the terms of which are limited by the specific provisions, rights, and liabilities detailed in the act of incorporation. To make a valid change in this private contract, as in any other, the assent of both parties is indispensable. The corporation on one part can assent by a vote of the majority, the individual on the other part by his own personal act. Consequently, where an assessment is sued for to advance objects essentially different, or the same objects in methods essentially different from those originally contemplated, they cannot be recovered because they are not made in conformity to the defendant's special contract with the corporation: *Angell & Ames on Cor.*, sec. 537; *Union Lock and Canal Co. v. Towne*, 1 N. Hamp. R. 44; 8 Mass. R. 268; 10 Mass. 384; 7 Barbour R. 157; 1 Harris, 133; *Hester v. Mem-*

phis & Charleston R. R., 32 Miss. 378. See *Legal Intelligencer*, Vol. XIV, No. 18.

"Whilst these principles are unquestionable, it is equally settled by the authorities that modifications and improvements in the charter, useful to the public and beneficial to the company and in accordance with what was the understanding of the subscribers as to the real object to be effected, do not impair the contract of subscription: *Irvin v. Turnpike Co.*, 2 Penn. R. 466; *Gray v. The Monongahela Navigation Co.*, 2 W. & S. 156; *Clarke v. Same*, 10 Watts, 364. The case of the *Indiana Turnpike v. Phillips*, 2 Penn. R. 184, is an instance of such radical alteration in the structure of the company as works a release of the subscriber.

"These general principles are founded in common sense, and it is apparent that they afford not the least support to this defense. The defendant voluntarily embarked in an enterprise which could only be carried out by accumulating large sums of money. His special contract with the other corporations looked to nothing less than a finished railroad from West Chester to Philadelphia, and it implied necessarily the ordinary and lawful means for accomplishing that object.

"When their money was expended and the work not finished, the necessary funds could only be raised by giving these funds a preference over the original stock, whether they came in the form of a loan or of preferred stock. Without the remedies provided by the legislature the defendant's stock must remain worthless in his hands; with them he shared a common chance with others of realizing ultimate profits. The legislature, then, without altering the structure of the company or changing the objects of its institution or the mode in which those objects were to be pursued, set on foot a scheme of finance

intended for its relief and benefit. It was to complete and equip the road—the very road—the defendant had agreed to assist to build.”¹

Increase of Capital Stock.

60. A railroad company chartered since the Act of April 18, 1874, must increase its capital stock in accordance with the provisions of that act; as to such companies the Act of 1874 repealed the Act of 1868. In *Chartiers Connecting Railroad*, SNODGRASS, deputy attorney-general, said: “The Chartiers Connecting Railroad was incorporated on November 21, 1881, under the provisions of the Act of April 4, 1868, P. L. 62, and the increase of capital in question purports to have been made under the 6th section of the act. The right of the corporation to increase its capital for the purposes, and to the amount authorized by the act, is not disputed, and the question, therefore, to be determined is whether the manner of effecting the increase is in conformity with law.

“The 7th section of article xvi of the Constitution, to which the corporation is clearly subject, provides that ‘the stock and indebtedness of corporations shall not be increased except in pursuance of general law, nor without the consent of the persons holding the larger amount in value of the stock first obtained at a meeting to be held after sixty days’ notice given in pursuance of law.’ The Act of April 18, 1874, P. L. 61, which was passed for the purpose of giving effect to the requirements of the Constitution, provides a method by which an increase of capital stock or indebtedness may be obtained, and clearly applies to railroads as well as to other classes of corporations having capital stock. This is so plainly indicated by the language of the 7th section as to preclude any

¹ 28 Pa. 339 (1857).

different conclusion, even if the general language in which the act is expressed was not of itself sufficient to include them.

"The only possible ground, therefore, upon which the manner of increasing capital adopted in the present case can be justified, is that the 6th section of the Act of 1868 has in some way become a part of the charter contract of this corporation, the obligation of which would be impaired by requiring it to comply with the provisions of the Act of 1874. It cannot be questioned that, under its charter, it has the right to increase its capital stock as provided in the Act of 1868, but there is a material difference between the right to so increase its capital stock as provided in the Act of 1868, and the manner by which that increase shall be effected. Whilst the right may be inviolate, the manner of its exercise may be changed, 'provided the change involves no impairment of substantial right' existing under the contract: *Gunn v. Barry*, 15 Wall. 623.

"If the Act of 1874, however, applies to railroad corporations as well as to those of other classes, its undoubted effect was to repeal the Act of 1868, so far as it provided a method for increasing the capital of such corporations, at least those subsequently created. As absolutely repugnant statutes in this regard, they could not be administered together and be at the same time in harmony with the Constitution. But if in fact there has been a repeal, this corporation, having been created subsequently, never did and could not acquire any 'substantial right' under an act which, so far as it relates to this subject at least, had been superseded and repealed before it acquired its corporate existence.

"This proposition, it seems to me, is so plain that it is scarcely susceptible of further elaboration, and hence it

follows that a lawful increase of the capital stock of this corporation cannot be effected under the Act of 1868, but only under that of 1874, to which, in my opinion, it is clearly subject."¹

The sixty days' notice of meeting for election for or against any increase of capital stock may be waived by the unanimous consent of all of the stockholders.²

Conversion of Bonds into Stock.

61. Where by the terms of a railroad bond the holder is given the option to convert it into the stock of the company at any time before a particular date after the expiration of the time, a mere extension of the time for the payment of the bond does not extend the right of converting it into stock.³

Dividends.

62. The statute of limitations will not begin to run against a claim for dividends until after demand and refusal, or notice to the shareholder that his right to the dividends is denied.⁴

Forfeiture of Stock.

63. The directors of a corporation may declare a forfeiture of stock after the company has made an assignment for the benefit of creditors. In such a case if the shareholder objects to the payment of his subscription to the treasurer of the company on the ground that he has

¹ 1 Pa. C. C. R. 270 (1886).

² Bellefonte & Buffalo R. R. Co.'s Case, 2 Chester County, 128 (1883).

³ Muhlenberg v. Philadelphia & Reading R. R. Co., 47 Pa. 16 (1864).

⁴ Philadelphia, Wilmington & Balt. R. R. Co. v. Cowell, 28 Pa. 329 (1857). In this case WOODWARD, J., doubted whether under the Pennsylvania statutes any incorporated company could set up the statute of limitations against a stockholder's dividends.

notice of the assignment, it is his duty to tender the amount to the assignee, and then if the assignee refuses to accept it the stockholder will have a clear equity to be relieved from any attempted forfeiture.¹

If a charter provides that the managers of a corporation may declare a forfeiture of stock if a stockholder shall omit for the space of six months to pay any installment which may be called for, a forfeiture may be declared without notice to the stockholder.²

¹ *Germantown Pass. Ry. Co. v. Fitler*, 60 Pa. 124 (1869).

² *Germantown Pass. Ry. Co. v. Fitler*, 60 Pa. 124 (1869).

CHAPTER V.

BONDS AND MORTGAGES.

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| 64. Bonds are Personal Property. | 83. Duties of Trustee Under Mortgage. |
| 65. Suits on Bonds. | 84. Sale. |
| 66. Interest. | 85. Jurisdiction over Sale. |
| 67. Irredeemable Bonds. | 86. Distribution of Proceeds of Sale. |
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| 69. Consideration for New Issue. | 88. Organization of New Company by Purchasers. |
| 70. Assignment of Bonds. | 89. New Company Not Liable for Debts of the Old Company. |
| 71. Sale of Bonds by Railroad Company. | 90. Effect of Sale on Debts Due to the Old Company. |
| 72. Invalid Transfer by President. | 91. Suit to Declare Mortgage Void. |
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| 74. Guaranty of Bonds of Another Railroad. | 93. Conflict of Laws. |
| 75. Coupons—Suits on Coupons. | 94. Deduction of Taxes. |
| 76. Presentment for Payment. | 95. Sale of Railroad by Execution Under Judgment of Private Creditors. |
| 77. Lost Coupons. | |
| 78. Coupons on County Bonds. | |
| 79. Liability of Guarantor. | |
| 80. Jurisdiction of Federal Courts. | |
| 81. Power to Mortgage. | |
| 82. Property Covered by Mortgage. | |

Bonds are Personal Property.

64. Bonds of a railroad company are personal property.¹

Suits on Bonds.

65. If suit is brought on one of several railroad bonds, the suggestion of default in payment of interest should specify whether the plaintiff claims to recover both the

¹ *Huntzinger v. Phila. Coal Co.*, 11 Phila. 609 (1876).

principal of the bond and interest, or interest only; and if he claims to recover the principal, whether there has been a default on all of the bonds.¹

Interest.

66. Interest is not allowed on interest due on registered bonds.²

Irredeemable Bonds.

67. The power to borrow money does not include the right to issue irredeemable bonds restricting the holder merely to a contingent share in the profits, nor to issue such bonds secured by a mortgage.³

Invalid Issue.

68. Bonds issued by a railroad company, which show upon their face that they were issued one day after the corporation was organized, are void, since they clearly violate the constitutional provision requiring sixty days' notice of meeting to stockholders.⁴

Consideration for New Issue.

69. A railroad company cannot under the Act of April 8, 1861, issue bonds otherwise than for a new adequate valuable consideration, increasing the available funds of the corporation.⁵

Assignment of Bonds.

70. The bonds of a railroad corporation, payable to "order or assigns," must be assigned under seal, and

¹ *Briscoe v. Philadelphia & Baltimore Central R. R.*, 1 Walker, 511 (1866).

² *Sherman v. Philadelphia & Reading R. R.*, 13 W. N. C. 238 (1883).

³ *McCalmont v. Philadelphia & Reading R. R.*, 10 W. N. C. 338 (1881) (U. S. C. C.) 14 Phila. 479 (1881).

⁴ *Maas v. Pennsylvania, Poughkeepsie & New England R. R.*, 1 Mona. 497 (1889).

⁵ *Kemble v. Wilmington & Northern B. R.*, 13 Phila. 469 (1878) (U. S. C. C.)

when so assigned they may be sued upon in the name of the assignee. If the bonds are made payable to bearer they are assignable by delivery, and may be sued in the name of the holder.¹

Sale of Bonds by Railroad Company.

71. A railroad company will not be enjoined from selling its bonds to pay off its floating debt at the complaint of a creditor, not holding a lien or other legal claim against the company's property.²

Invalid Transfer by President.

72. A transfer by the president of a railroad company of a county bond owned by the company as collateral security for an antecedent individual debt of the president himself is invalid where the bond shows on its face an assignment in blank purporting to have been made by the president by order of the board of directors. In such a case the person who receives the bond has constructive notice that the bond was in the hands of the president under an authority to negotiate it for the benefit of the corporation.³

And even where the president is authorized by the board of directors to sell and negotiate county bonds belonging to the company a transfer of the bonds by him to one of his creditors as collateral security for a pre-existing debt, no new consideration having passed at the time, is void.⁴

It is no defense to an action on the bonds of a railroad company by a *bona fide* purchaser that the bonds had been issued by the president of the company without authority,

¹ Bunting's Admr. v. Camden & Atlantic R. R., 81 Pa. 254 (1876).

² Erie Railway Co. v. Wilkes-Barre Coal & Iron Co., 9 Phila. 262 (1872).

³ Gerrard v. Pittsburgh & Connellsville R. R. Co., 29 Pa. 154 (1857).

⁴ Pittsburgh & Connellsville R. R. Co. v. Barker, 29 Pa. 160 (1857).

and that he had made no return of the proceeds to the company; nor is it a defense that the company had no power to create the mortgage which accompanied the bonds, nor that the bonds bore an illegal rate of interest.¹

Stolen Bonds.

73. A *bona fide* purchaser of railroad company bonds, without notice that they were stolen, has a good title to them against the former owner.²

Guaranty of Bonds of Another Railroad.

74. A railroad company has no power without express authority to guarantee the payment of a bond of another railroad company.³

Where bonds are negotiable, and a guaranty is indorsed upon them, the guaranty passes with the bonds to the holder.⁴

Coupons—Suits on Coupons.

75. The holder of coupons whether attached to or severed from the bonds of a railroad company, payable to bearer, may maintain an action on the coupons against the company, and recover interest on the amount of the same from the time they become due and payable.⁵ The right to such an action is not limited to coupons which matured within six years prior to the institution of the suit.⁶ In such a suit an affidavit of defense must be filed.⁷ Coupons

¹ *Phila. & Sunbury R. R. Co. v. Lewis*, 33 Pa. 33 (1859).

² *Carpenter v. Rommel*, 5 Phila. 34 (1862).

³ *Pennypacker v. Camden & Atlantic R. R.*, 3 Penny. 402 (1883).

⁴ *Camden & Atlantic R. R. v. Core*, 18 W. N. C. 20 (1886).

⁵ *Philadelphia & Reading R. R. v. Smith*, 105 Pa. 195 (1884).

⁶ *Philadelphia & Reading R. R. v. Fidelity Insurance, Trust & Safe Deposit Company*, 105 Pa. 216 (1884).

⁷ *Philadelphia & Reading R. R. v. Fidelity Insurance, Trust & Safe Deposit Company*, 105 Pa. 216 (1884); *Gilmer v. Philadelphia & Reading R. R.*, 7 W. C. C. 15 (1879).

are *prima facie* evidence that the holder is also the holder of the bond from which they are cut, or else was so when they were separated.¹

Coupons for interest are distinct instruments for payment of money, and may be sued on without filing copies of the bonds to which they belong, even where the latter are overdue and unpaid.²

Where a railroad company delivers its coupon bonds from time to time to the contractor for building the road as the work progresses, the company cannot set up a claim for damages for the contractor's delay in finishing the road against holders of the bonds who had received them in good faith from the contractor. "The bonds having been legitimately handed over as a payment under the contract, carried with them their contract incident, to wit, the interest from date. This being done by the act and agreement of the parties through their trustee, this title passed to the holder of the bonds when negotiated, and it cannot be said that the holder of the bond, with its undetached coupons, is put upon notice of a defense as to the delay, because some of the coupons happened to be overdue. The very purpose and intent of such bonds is to set them afloat in the market as the means of raising money to build the road. The railroad company having by their own agreement and act sent them into the current, and received a substantial consideration in the construction of their road, are estopped from setting up a claim for damages against the holders because of the delay in the work."³

The pledgee of a bond has a right to recover in his own name on overdue coupons.⁴

¹ McCoy v. Washington County, 7 Am. Law Reg. (O. S.) 193 (1859); Evans v. Cleveland & Pittsburgh R. R., 5 Phila. 512 (1864) (U. S. C. C.).

² Fidelity Co. v. Philadelphia & Reading R. R., 13 W. N. C. 261 (1883).

³ AGNEW, J., in McElrath v. Pittsburgh & Stubenville R. R., 55 Pa. 189 (1867).

⁴ Weidner v. R. R. Co., 1 W. N. C. 472 (1875).

Presentment for Payment.

76. A railroad company cannot resist payment of interest on coupons on the ground that no demand was made for their payment, where it appears that the company had no funds at the place at which the coupons were to be presented for payment.¹

In an action upon coupons, it is necessary to a complete defense to allege in the affidavit of defense that the company was ready at the place where the coupons were to be presented, to pay them, and that they had not been presented.²

To a suit on coupons, the affidavit of defense alleged that the greater part of the plaintiff's claim upon the coupons had accrued more than six years before the bringing of this suit; that the coupons were payable at the Mechanics' National Bank of New York, and payment had not been demanded there, and that the bonds from which said coupons were detached were secured by a mortgage of the corporation wherein a special remedy was provided in case of default, and that said remedy was exclusive. It was held that the affidavit was insufficient.³

When interest coupons of mortgage bonds have been presented and paid at the place of payment with money furnished by a third party, a private arrangement between such third party and the mortgagor that the transaction shall be treated as a purchase of the coupons by the former, is not enforceable against the bondholder.⁴

Lost Coupons.

77. If the coupons are lost the owner, on tender of in-

¹ North Penn. R. R. Co. v. Adams, 54 Pa. 94 (1867).

² Phila. & Balt. Cent. R. R. v. Johnson, 54 Pa. 127 (1867).

³ Helmbold v. D., H. & W. R. R., 14 W. N. C. 128 (1883). See, also, Philadelphia & Reading R. R. v. Smith, 15 W. N. C. 371 (1884).

⁴ Fidelity Ins., Trust & Safe Deposit Co. v. Western Pennsylvania & Shenango Connecting R. R., 138 Pa. 494 (1891).

demnity, is entitled to recover, with interest from date of demand. HARE, J., said: "The right of the holder of a coupon bond, who has demanded payment of the coupons without success, to interest on them as compensation for the delay, which forms another of the points reserved in this case, has been vindicated on the ground that coupons being severable if not separate, from the writing to which they are attached, should be regarded as distinct instruments, and bear interest as such from the time of default until they are actually paid. But this argument is open to the objection that coupons are themselves for interest, and that interest upon interest is not favored by the law, and will not ordinarily be allowed unless there is an express stipulation that it shall be paid. The question has been put at rest in this State by a recent decision of the Supreme Court, that the object for which coupons are attached to a bond being to secure punctuality of payment, implies that the holder shall be compensated if the obligor makes default by not paying on presentment, at the time and place stipulated. And as the plaintiff in this case made up for the want of presentment, which had become impossible, by the tender of an indemnity which is conceded to have been sufficient, it was as much the duty of the defendant to pay as if the instrument itself had been presented."¹

Coupons on County Bonds.

78. The coupons attached to a county bond payable to a railroad company or bearer are negotiable instruments, and may be sued upon by the holder separate from the bonds, and interest may be recovered on them from the date of the demand for payment.²

¹ *Fitchett v. North Pennsylvania R. R.*, 5 Phila. 132 (1863); *s. c.*, affirmed 1 Walker, 129 (1863).

² *County of Beaver v. Armstrong*, 44 Pa. 63 (1863).

Bonds with semi-annual coupons were issued to the company by a county in payment of stock, the company agreeing to pay the interest on the bonds. The county paid the interest. It was held that the company was liable for interest on the coupons. A vendee of the county stock, however, had no right to the interest on the bonds.¹

Liability of Guarantor.

79. The guarantor of the principal and interest of railroad bonds is liable for interest upon overdue coupons attached to the bonds.

The Schuylkill Navigation Company's bonds were indorsed as follows: "Know all men by these presents, that for a valuable consideration the Philadelphia & Reading Railroad Company hereby guarantee the punctual payment of the principal and interest of the within obligation when and as the same shall respectively fall due." The court held that interest ran upon the overdue coupons, and that the guarantor was liable to pay it. PAXSON, C. J., said: "There can be no doubt that the Schuylkill Navigation Company would have been liable to pay interest on their coupons. Is the Reading Railroad Company as surety on the bonds in any better position? We think not. As such surety the company is bound to the full extent that the principal is bound. This is the general rule in regard to sureties, and there is nothing in this case to limit this liability. The plaintiffs in error knew when they guaranteed the bonds that they had coupons attached, and that if the coupons were not paid at maturity interest could be recovered thereon. Their contract was an original undertaking, and the holders of the coupons had a right to proceed at once

¹ *Pennsylvania & Connellsville R. R. v. Allegheny County*, 63 Pa. 126 (1869).

against the surety. The holders of the coupons are not bound to surrender them until paid with interest; the surety has no right to demand them until payment in full of both principal and interest."¹

In an action of debt brought to recover a sum of money due upon coupons and bonds of a county guaranteed by a railroad company, it was held that the railroad company had authority under its general powers to make the contract of guaranty.²

Jurisdiction of Federal Courts.

80. The holder of a coupon bond payable to bearer, being a citizen of a different State from the defendants, is entitled to sue in the courts of the United States, though the previous holder of the bond might not have been so entitled to sue.³

Power to Mortgage.

81. Unless authorized by its charter, a railroad company has no power to borrow money and mortgage its franchise and property to secure it.⁴

If, however, authority is given by the legislature to a railroad company to mortgage its franchises, the usual remedies to enforce the mortgage are necessarily implied in the grant.⁵

A railroad having the power to mortgage its property has also the power to borrow money. The manifest purpose of a mortgage is to secure loans of money, and the

¹ Philadelphia & Reading R. R. Co. v. Knight, 124 Pa. 58 (1889).

² Evans v. Cleveland & Pittsburgh R. R., 2 Pittsburgh Rep. 483 (1864) (U. S. C. Ct.).

³ M'Coy v. Washington County, 7 Am. Law Reg. (O. S.) 193 (1859).

⁴ Pittsburgh & Connellsville R. R. v. Allegheny County, 63 Pa. 126 (1869).

⁵ Mendenhall v. West Chester & Philadelphia R. R. Co., 36 Pa. 145, note (1860).

power to borrow money and to give the ordinary evidence of loans in the form of bonds or other obligations to the same effect, is a necessary incident to the power to mortgage. In addition to this the power to borrow money is also a necessary incident of the right to build a railroad.¹

A supplement to an act incorporating a railroad company authorized the company to mortgage its road, and any real or personal property belonging to it "for the purpose of carrying out the privileges granted by the act and the several supplements thereto incorporating the same." It was held that the power to mortgage thus given extended to future extensions of a railroad and all other real and personal estate of the company without regard to the time of acquisition.²

If a railroad company, without express authority to mortgage its franchises, make a mortgage covering both its railroad and franchises, the validity of the mortgage, as far as the railroad is concerned, is unaffected by the fact that the corporate franchises are included in the mortgage.³

A railroad company was authorized to "acquire and convey at pleasure all such real and personal estate as may be necessary and convenient to carry into effect the objects of incorporation," and "pledge the property and income of said company," and for this purpose "to execute a deed of mortgage" which "may include personal as well as the real property of said company." It was held that the company had power to execute a mortgage including "engines, cars, machinery, tools, and implements" and "materials connected with the proper equip-

¹ *Gloninger v. Pittsburgh & Connellsville R. R.*, 139 Pa. 13 (1891).

² *Gloninger v. Pittsburgh & Connellsville R. R.*, 139 Pa. 13 (1891).

³ *Gloninger v. Pittsburgh & Connellsville R. R.*, 139 Pa. 13 (1891).

ment, operating, and conducting of said railroad now owned or hereafter to be acquired, in substitution of those now owned or otherwise, all of which are declared to be appurtenances of said railroad, and to be used and sold therewith, and not separated therefrom, and are to be taken as part thereof.”¹

A railroad company, after insolvency and appointment of receivers, adopted a plan by which, in order to pay the floating debt, income bonds were to be issued and sold entitling the holder to a certain dividend and share in the profits after payment to a dividend to stockholders; and, in order to retire and pay the mortgage debts of the company, bonds secured by a new mortgage for the whole amount of such debts were to be executed, some of which were to be payable in fifty years, and the others to be perpetual. It was held, that in the absence of express legislative authority the issue of such obligations was beyond the power of the company, and would be restrained by injunction at the suit of stockholders.²

A mortgage given for a sum greater than twice the amount paid up of its capital stock is good as between *bona fide* holders of the mortgaged bonds and the company. Subsequent creditors of the company, who become such with notice of the mortgage stand in the same position as the company, and cannot claim to be preferred to the holders of the bonds. In such a case the provisions of the Constitution prohibiting the fictitious increase of corporate indebtedness does not apply.³

Where a railroad company is authorized to borrow money not exceeding in amount “one-half of the par value of the capital stock,” it can only borrow to an

¹ Covey v. Pittsburgh, Ft. Wayne & Chicago R. R., 3 Phila. 173 (1858).

² Taylor v. Philadelphia & Reading R. R. Co., 7 Fed. Rep. 386 (1881).

³ Fidelity Ins., Trust & Safe Deposit Co. v. Western Pennsylvania & Shenango Connecting R. R., 133 Pa. 494 (1891).

amount equal to one-half of the capital actually paid in, and not one-half of the authorized capital.¹

A railroad company having authority under its original act and corporation passed prior to the Constitution of 1874, to make an increase of its indebtedness, is not affected by the provisions of the Constitution and the Act of April 18, 1874, regulating the manner in which the indebtedness of corporation may be increased.²

A minority stockholder cannot complain of an issue of mortgage bonds to a holder of the majority of the stock, if such an issue of bonds was without fraud, for an adequate consideration, and was a great benefit to the corporation; although the bonds were issued to enable the majority stockholder to raise money for himself.³

Property Covered by Mortgage.

82. Land held by a railroad company, but not appurtenant to the railroad nor indispensably necessary to the enjoyment of its franchises does not pass by a sheriff's sale under a mortgage of the railroad with its corporate privileges and appurtenances. Thus town lots owned by a railroad company, and not necessary for the operation of a road do not pass under such a sale, and this is the case although the railroad company may have intended to use the lots upon which to construct a basin to facilitate their coal trade. In *Shamokin Valley R. R. Co. v. Livermore*, AGNEW, J., said: "So far as the railroad was involved its purposes were of public nature—the transportation of freight and passengers—but so far as the company prosecuted the coal trade, it was an object of private gain, not essential to the railroad franchise, and

¹ *Commonwealth v. Lehigh Avenue Railway*, 129 Pa. 405 (1889).

² *Gloninger v. Pittsburgh & Connellsville R. R.*, 139 Pa. 13 (1891).

³ *Gloninger v. Pittsburgh & Connellsville R. R.*, 139 Pa. 13 (1891).

which they might or might not prosecute at pleasure. Now, admitting that the company might, by implication from the language of the charter, establish a basin, as a device for the more convenient carrying on of the coal trade, yet it was a work not essential to the railroad franchise involving the public interests, and therefore one the company might establish or withdraw at their pleasure. A basin may be very convenient to enable boats to approach a railroad and take freight from its cars, but clearly it does not belong to it, constitutes no essential incident, and therefore, like warehouses, coal-yards, machine shops, etc., is an independent structure.”¹

The rolling stock and equipments of a railroad company cannot be seized in execution after the company has become insolvent or has mortgaged its stock and equipments.²

A railroad company was authorized to issue bonds and to secure the payment of the bonds to execute a mortgage “of all or any part of their road, property, rights, liberties, and franchises of the said company in the State of Pennsylvania.” In pursuance of this power the company executed a mortgage of “all the road, property, rights, liberties, privileges, corporate franchises, incomes, tolls of receipts, now held or hereafter to be acquired in the State of Pennsylvania.” It was held that the mortgage was a lien upon engines, rolling stock, etc., in actual use by the company, and required for the transaction of its business, whether owned at the date of the mortgage or afterward acquired.³

Old rails or new rails and chairs laying along the track of a railroad in readiness for repairs or reconstruction can-

¹ 47 Pa. 465 (1864).

² *Loudenslager v. Benton*, 4 Phila. 382 (1861).

³ *Philadelphia, Wilmington & Baltimore R. R. v. Woelpper*, 64 Pa. 366 (1870).

not be taken in execution under a judgment against the railroad company. A mortgage of the personal property of the company is good without delivery of possession to the mortgagee against an ordinary judgment creditor, as respects all property necessary to carry on the business of the railroad.¹

A railroad company purchased land in excess of the quantity limited by its charter. It then mortgaged all its property, franchises, etc., in trust to secure bonds. After the mortgage was executed a judgment was entered against the company. Subsequently the trustee under the mortgage under a decree in equity sold all the property of the company. After this sale the land was sold under the judgment. It was held that the purchaser under the judgment took no title.²

If a railroad company has power to mortgage all its property, real and personal, and it executes a mortgage of everything of a real and personal nature owned by it, it is immaterial whether certain real property included in the mortgage was necessary to the use or enjoyment of a railroad or not.³

A railroad company was authorized to hold so much land, not above five acres in any one place, and improvements necessary for water stations, etc. The company purchased land which was not used for the road, and mortgaged all its property and franchises, with the right to maintain possession "according to the effect and meaning" of the acts of incorporation. It was decided that the land purchased was not included in the mortgage.⁴

If a dispute arises between the execution creditors and the trustees of a mortgage as to whether property

¹ *Covey v. Pittsburgh, Fort Wayne & Chicago R. R.*, 3 Phila. 173 (1858).

² *Youngman v. Elmira & Williamsport R. R.*, 65 Pa. 278 (1870).

³ *Robinson v. Atlantic & Great Western Ry.*, 66 Pa. 160 (1870).

⁴ *Youngman v. Elmira & Williamsport R. R.*, 65 Pa. 278 (1870).

levied upon was covered by the mortgage an interpleader should be allowed.¹

Plaintiff's judgment creditors levied upon horses and harness of a street-car company. A trustee for mortgage bondholders gave notice to the sheriff that the property was subject to the lien of the mortgage. The court held that the proper course was for the sheriff to sell the interest of the defendant company subject, if any, to the rights of the mortgagees.²

A railroad company has no right to take up the tracks and discontinue the operation of a portion of its railroad covered by a mortgage, although such portion of the railroad is not self-sustaining, and the plaintiff has other and ample security, and the company intends to sell the rails and appropriate the proceeds to the payment of the mortgage.³

An Act of Assembly which provides that the mortgagees of a railroad shall be confirmed and ratified in their title to the land which the company could legally mortgage, provided they released certain other lands designated by a commissioner as not necessary for the purposes of a railroad, is a contract between the State and the mortgagees, protected by the Constitution of the United States and a subsequent act appointing a commissioner to again pass upon the lands necessary for the use of a railroad is invalid in so far as it affects the mortgagees.⁴

Mortgagees of personal property of a railroad company, out of possession, have no priority over a creditor who has obtained a lien. Thus where creditors have issued foreign attachments against mortgage deeds in the hands

¹ *Eckfelt v. Starr*, 5 Phila. 497 (1864).

² *Brill v. West End Pass. Ry.*, 4 W. N. C. 139 (1877).

³ *Watt v. Hestonville, Mantua & Fairmount Pass. Ry.*, 1 Brewster, 418 (1867).

⁴ *Drew v. New York & Erie R. R.*, 32 P. F. Smith, 46 (1870).

of a railroad company, they are entitled to priority over the mortgagees of the garnishees.¹

A mortgage was made of a railroad as then made or to be made. A later mortgage was created, under authority of a subsequent Act of Assembly, of a branch or extension of the original road. The special act provided that the later mortgage should be a first lien on the branch. It was held that a sale under the original mortgage must be exclusive of the branch.²

Duties of Trustee under Mortgage.

83. A trustee under a mortgage of the franchises and property of a railroad company is a trustee for all the bondholders secured by the mortgage. "Until default is made in the payment of the bonds, or the interest falling due upon them, the trustee has no active duties to perform, but is simply the repository of the title to the property mortgaged, in trust for the whole creditor class secured thereby. The actual possession of the franchises and the other property remains in the railroad company, to enable it to discharge its duties to the public and earn an income from which to pay its liabilities. But when a default occurs, the duties of the trustee become active and important. He represents all the bondholders, and is under obligation to protect them so far as the property in his hands in trust for them will enable him to do so. If he neglects or refuses to move, any bondholder may proceed by bill filed on behalf of himself and the other members of the class of creditors to which he belongs, to compel a sale of the mortgaged premises, a removal of the trustee, or such other relief as may be appropriate. The bonds are not payable to the mortgagee, but to the bearer ;

¹ Merchants' Bank v. Petersburg R. R., 12 Phila. 482 (1877).

² Randolph v. Wilmington & Reading R. R., 11 Phila. 562 (1876).

they are not special but negotiable instruments, passing from hand to hand by delivery or indorsement; they find a market in all parts of the civilized world, and are held as an investment in moneyed institutions and by private persons. The mortgagee has no right to the custody of one of the bonds unless he buys it like any other investor, and they furnish him no choice of remedies. He is shut up to the remedies provided by the mortgage and those which the courts of equity may afford him for the purpose of bringing the mortgaged property to sale."¹

If the mortgage creates a trust, and provides that the power of sale is to be executed by the trustee in certain contingencies, he may be controlled, restrained, and directed by a court of equity at the suit of a party standing in the relation of a *cestui que trust*, the rule for his guidance being derived from the instrument itself. But where there is no trust to be administered as the immediate object of the suit, or the contingency has not happened which was to bring it into exercise, courts of equity have no jurisdiction in Pennsylvania over mortgages; mortgagees are left to their common law and statutory remedies.²

Sale.

84. The franchises of a railroad company must be levied on and sold as an entirety.³

Real estate upon which tracks are laid to convey cars to a freight wharf and for shifting and storing cars, cannot be taken in execution and sold separately from the other property of the company.⁴

In foreclosure proceedings under a railroad mortgage,

¹ *Com. v. Susquehanna & Delaware River R. R.*, 122 Pa. 306 (1888).

² *Bradley v. The Chester Valley Railroad Co.*, 36 Pa. 141 (1860).

³ *Longstreth v. Philadelphia & Reading R. R.*, 11 W. N. C. 309 (1882).

⁴ *Longstreth v. Philadelphia & Reading R. R.*, 11 W. N. C. 309 (1882).

the bondholders are not parties. The true party is the trustee to whom the mortgage is given as the security for all the bonds issued under it. The bondholders are, however, privies in interest, and may come in to defend *pro interesse suo*, but their rights are affected by the decree against their trustee.¹

A sheriff's sale of the franchises and property of a railroad company made under execution on judgment of an individual bondholder for arrears of interest upon bonds secured by a mortgage, will not pass title to the franchises and property covered by the mortgage.²

Woelpper held bonds amounting to \$27,200, secured by a mortgage upon the franchises, liberties, property, etc., "now held or hereafter to be acquired by the Philadelphia & Baltimore Central Railroad Company." The Philadelphia, Wilmington & Baltimore Railroad Company held bonds secured by the same mortgage for \$122,982.11, and, a default having been made, recovered judgment for the said sum, and levied upon the engines and rolling stock of the company. Woelpper filed his bill against the plaintiff in the writ and the sheriff, asking, among other forms of relief, "that it be declared the property levied upon as aforesaid is a part of the mortgaged premises, and is exempt from levy and sale under the execution on the judgment hereinbefore mentioned, or under any other execution that may hereafter be issued thereon." The master recommended a decree in accordance with the foregoing prayer. The Court of Common Pleas of Chester County made the decree as recommended. The case was brought into the Supreme Court by appeal, and decree was affirmed and appeal dismissed.³

¹ *McElrath v. Pittsburgh & Steubenville R. R.*, 68 Pa. 37 (1871).

² *Com. v. Susquehanna & Delaware River R. R.*, 122 Pa. 306 (1888).

³ *Phila., Wilmington & Baltimore R. R. v. Woelpper*, 64 Pa. 366 (1870).

One entire railroad will not pass as appurtenant to another railroad. In *Philadelphia v. Philadelphia & Reading Railroad Co.*,¹ it appeared that in 1831, the commonwealth determined to build a railroad from Columbia to the intersection of Broad and Vine Streets in Philadelphia; with the proviso that before any part of the railroad between the west bank of the Schuylkill River and the intersection of said streets should be contracted for, the city should engage to construct and continue the railroad to Cedar Street; the city constructed the latter road. Subsequently under an Act of Assembly the canal commissioners sold to the Philadelphia & Reading Railroad Company the portion of the State road east of the incline plane at Philadelphia with its appurtenances. The court held that no part of the road built by the city passed by the deed.

Where a mortgage provides that upon failure to pay the interest on the same, the trustee shall have power to take possession of the railroad, and to exercise the corporate franchises for the benefit of creditors, a court of equity has no power upon default in the payment of interest to decree a sale of the road. The remedy provided in the mortgage itself must be pursued.²

A bond of a railroad company provided that upon three successive defaults in payments of interest, the principal should become due. The mortgage which secured the bonds provided that the trustees in it should sell the mortgaged property at the request of the holders of \$100,000 in the bond. The court held in an action of debt on the bonds that the provision in the mortgage was no defense. "This was an action of debt on bonds, and if there was a breach of condition, the fact that s

¹ 58 Pa. 253 (1868).

² *Bradley v. Chester Valley Railroad Co.*, 36 Pa. 141 (1860).

mortgage had been given as security for the debt with trusts and covenants, which a court of equity would control and enforce in a proper case, afforded not a shadow of defense. The bond was the principal debt, the mortgage the incidental security. Remedies peculiar to each exist, both in law and equity but they do not clash and destroy each other, they co-exist."¹

A railroad company whose franchises and property have been sold at a receiver's sale, cannot recover its road-bed by an action of ejectment, on the ground that there was fraud in the sale. The sale should be first set aside by proceedings in equity.²

Jurisdiction over Sale.

85. The Constitution of 1874 takes from the Supreme Court jurisdiction to decree a sale of the property of the corporation under a mortgage, and the fact that an injunction is also prayed for in the bill of foreclosure does not affect the case.³

Where a railroad is constructed partly in Pennsylvania and partly in another State, and the whole of its property is covered by a mortgage, the courts in Pennsylvania by a decree operating upon the trustee himself, may compel him to sell and convey whatever interest of the railroad company will pass under the terms of the mortgage.⁴

The United States courts have power to decree the sale of a railroad, as a whole, where portions of a railroad are in different States. A mortgage was made by a railroad

¹ Philadelphia & Baltimore R. R., 54 Pa. 127 (1867).

² New Castle Northern Ry. v. New Castle & Shenango Valley R. R., 152 Pa. 95 (1892).

³ Fargo v. The Oil Creek & Allegheny River Ry. Co., 32 P. F. Smith, 266 (1875).

⁴ McElrath v. Pittsburgh & Steubenville R. R., 55 Pa. 189 (1867).

company whose road ran through parts of the States of Delaware and Pennsylvania, of all its property, franchises, etc., to trustees, to secure the payment of certain bonds; default was made in payment of the interest, and as the trustees declined to sell the Delaware franchises and the Birdsboro extension of the road, the plaintiff, a bondholder, filed a bill, asking for a decree directing the mortgaged premises to be sold as one property. It was held that the court had power to decree relief, notwithstanding that part of the railroad was in the State of Delaware.¹

Distribution of Proceeds of Sale.

86. A master in foreclosure proceeding must consider and settle the title of adverse claimants to bonds. He cannot, however, go behind the decree of foreclosure. He must distribute the fund to the parties entitled under the decree.²

In distributing the proceeds of the sale of a railroad in foreclosure proceedings, the master must distribute the fund to the parties entitled under the decree. He cannot go behind the decree to inquire whether it was rightfully made, or whether the parties before him are entitled to hold a position different from that which the decree assigns to them. Thus where the trustee under a first mortgage files a bill to foreclose, and makes the trustee under the second mortgage a party, and a decree is entered postponing the second mortgage, the only remedy for a bondholder under the second mortgage alleging error, is a bill of review or a petition for rehearing.³

¹ *Randolph v. Wilmington & Reading R. R.*, 11 Phila. 502 (1876).

² *Rice v. Southern Pennsylvania Iron R. R.*, 9 Phila. 294 (1873).

³ *McElrath v. Pittsburgh & Steubenville R. R.*, 68 Pa. 37 (1871).

Agreement to Buy Railroad at Foreclosure Sale.

87. An agreement entered into between the bondholders and stockholders of a railroad company to buy in the property at a judicial sale, is valid if made in good faith.

An agreement was entered into between the bondholders of a railroad company, all of the stockholders, and by most of the unsecured creditors entitled to sign by the terms of the agreement. It recited the default of the company in paying interest and the threatened sale of its property, and then declared, for the protection of their several and respective interests in the property from great loss and sacrifice, they desired to unite together for the purpose of bidding on the property, should the same be offered for sale, and in purchasing it for and on their respective accounts, as therein more particularly stated, and to organize a new company. It proceeded, *inter alia*, to classify the parties to the contract according to the nature of their several claims, and stated the sum each should pay toward the purchase of the property, and the character of the bonds the bondholders should be entitled to in the corporation to be formed, and the shares of the capital stock therein to which each should be entitled. It was held that the agreement was valid.¹

An agreement by stockholders, bondholders, and certain of the creditors of a railroad company to buy it in at a foreclosure sale, does not raise a resulting trust for creditors who have not participated in the agreement.²

If the bondholders agree to purchase the property at a proposed judicial sale, and one of the bondholders purchases the property under the agreement, the other bondholders cannot participate in the benefits of the sale

¹ Pennsylvania Transportation Co.'s Ap., 101 Pa. 576 (1882).

² Pennsylvania Transportation Co. v. Pittsburgh, Titusville & Buffalo R. R., 11 W. N. C. 35 (1881); Landis v. Western Pennsylvania R. R., 133 Pa. 579 (1890).

unless they pay their proportionate amounts of the expenses and advances to the person who bids in the property.¹

In 1859 a bill was filed to foreclose a mortgage given by the Northwestern R. R. Co. The railroad was purchased by Hirst for certain bondholders, and a master was appointed to report distribution and the form of the conveyance. The master reported on behalf of certain bondholders named, not including plaintiff, and of such others as might wish to join in the purchase and pay their proportions of the purchase-money and expenses, that the property was bought to sell again in such manner as three-fourths of the bondholders should direct. The master also reported a form of deed to Hirst in which it was recited that it was in trust for all the bondholders. In April, 1860, in pursuance of the direction of three-fourths of the bondholders, Hirst conveyed to the West Penna. R. Co., organized by the purchasing bondholders to succeed the N. R. Co., "free and discharged from all and every trust whatsoever." The act incorporating the W. P. R. Co. recited that said company was composed of persons named, and "all others who hold mortgage bonds," but the preamble set out in the deed to Hirst "in trust for all the bondholders who participated in the said purchase," and that it was desirable "to reimburse the said bondholders for their expenditure of money and labor." In 1889, the plaintiff, as surviving partner, discovered among the assets of the firm a N. R. Co. bond, which by its terms was convertible into stock, and brought assumpsit against the W. P. R. Co. to recover for their refusal to exchange said bond into stock of the W. P. R. Co. Plaintiff claimed that Hirst took as trustee for all the bondholders of the N. R. Co. and that the

¹ Fidelity Insurance, Trust & Safe Deposit Co.'s Ap., 106 Pa. 144 (1884).

conveyance to the W. P. R. Co. was really with the agreement that said company assumed Hirst's duties as such trustee, and that the W. P. R. Co. was therefore bound to make the exchange demanded. It was held that plaintiff had merely an option to participate in the new company by coming in within a reasonable time and sharing in the expenses and risk, and that the last chance to exercise such option was when the deed was made to the Western Pennsylvania Railroad Company, clear of all trusts.¹

Organization of New Company by Purchasers.

88. Where an act provides that the purchasers at the sale of a railroad shall be a body corporate with all the rights of the corporation whose property they have bought, mere irregularities in the organization of the new company after the sale are not necessarily fatal to its existence as a corporation. Where, under such an act, a railroad is purchased by a single individual he may organize a new corporation, and this corporation may adopt a common seal and determine the amount of its stock, and the certificates of stock may be issued, not only to the actual purchasers of the railroad, but also to such persons as the purchasers may designate.²

An agreement was made by the holders of the bond of an insolvent railroad company, under which a new company was organized on the basis of a division of the stock in certain proportions among those interested in the old company, and it was agreed, among other things, that "the expense of carrying out this agreement, printing new bonds, etc.," be sustained by the new company. In an action by certain of said bondholders against the new

¹ *Landis v. Western Pennsylvania R. R.*, 133 Pa. 579 (1890).

² *Com. v. Central Pass. Ry. Co.*, 52 Pa. 506 (1866).

company to recover the amount paid by plaintiffs to an attorney for his professional services, it was held, that the words "printing bonds, etc.," did not restrict the agreement to expenses of that character only, but covered all reasonable and necessary expenses in carrying out the agreement.¹

After a private railway had been declared a nuisance by the courts and enjoined, the owner of the road with other persons organized a corporation with authority to buy any railroad partly or wholly completed, damages to be ascertained according to the general railroad law. The owner of the road sold it to the corporation, receiving therefor the whole capital stock of the company. It was held that the railroad after the purchase was still a private road, and that the company had no authority under its charter to purchase it.²

New Company not Liable for Debts of the Old Company.

89. Where the purchasers of a railroad company at a foreclosure sale are authorized to become a corporation, and organize themselves into a corporation under the same name as the old company, except that the word "railway" is used instead of "railroad" in a corporate name, the new corporation is not liable for the debts of the old company.³

Where the franchises and property of a railroad company are sold at a judicial sale, and a new company is subsequently organized by the purchaser, the new company is not liable for the negligent operation of the railroad during the period between the sale and the organization of the company.⁴

¹ *Catawissa Railroad Co. v. Titus*, 49 Pa. 277 (1865).

² *McCandless's Ap.*, 70 Pa. 210 (1871).

³ *Stewart's Appeal*, 72 Pa. 291 (1872).

⁴ *Pittsburgh, Cincinnati & St. Louis Ry. Co. v. Fierts*, 96 Pa. 144 (1880).

A railroad company placed a mortgage upon a branch railroad. The mortgage recited that the company had built a branch road with the money of the company, and it was deemed expedient by the contractors to fund certain coupons of the second mortgage on the main line, held by plaintiff, by issue of scrip, convertible into first mortgage bonds. Before the new bonds were issued the mortgage with the recital was released, the release containing a misrecital of the mortgage-book. A new mortgage was then placed upon the branch containing no provision for funding the bonds. The franchises were afterward sold at a judicial sale and a new company organized. The holder of the coupons referred to in the released mortgage petitioned for a mandamus to compel the new company to fund his coupons. It was held that he was not entitled to the writ.¹

The purchasers of a railroad are not liable to a land-owner where the original railroad company entered a bond to secure the land-owner his damages.²

A decree directing a judicial sale of the franchises and property of a railroad company provided: "Any purchaser . . . shall take . . . subject to all unpaid purchase-money for any of the lands or rights of way herein referred to, as well as also all unpaid claims of land-owners for damages for property taken, injured, or destroyed in the construction of the railroad." It was held that the decree related merely to land damages, and did not extend to a debt of the old company on a general judgment for damages by trespass for entering upon plaintiff's land and constructing its road. MITCHELL, J., said: "All that is included in this language is what is commonly known as land damages, to wit, compensation to

¹ *Commonwealth v. Wilmington & Northern R. R.*, 2 Mon. 538 (1889).

² *Potter v. Pittsburgh Southern R. R.*, 17 W. N. C. 40 (1886).

the owners of the land over or along which the railroad is constructed, for the injury to their land by such construction, and the right of action is given in the words of the Constitution to all owners of land, for 'property taken, injured, or destroyed by the construction.' Such damages form a well-known class, having certain features peculiar to themselves, such as express protection by name in the Constitution, exemption from ordinary statutes of limitation, etc. This is the class of claims which the decree imposes upon the purchaser. It is not said that he shall take subject to the debts or judgments generally, as for goods furnished or services rendered, or for negligence or trespasses, but only for the particular class of obligations clearly indicated. The claim of the plaintiff is for the debt of the old company on a general judgment for damages by trespass. It is on the same legal footing as to the purchaser, the present defendant, as a judgment for damages for burning plaintiff's barn, or running over his cattle. It is not in any legal sense for land taken, or right of way acquired. The plaintiff's claim for compensation, in that regard, was the same after this judgment as before. It is this feature which distinguishes the present case from *West. Penn. R. Co. v. Johnston*, 59 Pa. 290, and *Buffalo, etc., R. Co. v. Harvey*, 107 Pa. 319. Those were cases of damages for land taken in the construction of the railroad, and in the former the charter of defendant expressly made such damages a perpetual lien until paid."¹

A railroad company after securing a right of way through plaintiff's land became insolvent in 1874, and work was discontinued. In 1879 the franchises and property of the road were sold at a judicial sale, and the purchasers organized a new company. Plaintiff filed a bill

¹ *Campbell v. Pittsburgh & Western Ry.*, 137 Pa. 574 (1890).

in equity to restrain the reorganized company from building the railroad through his land, alleging forfeiture of charter for non-user and misuser, and for want of title in the purchases. It was held that a preliminary injunction was properly refused.¹

But a land-owner's claim for damages is paramount to a mortgage given by a railroad company before the damages have been paid or secured; and the sale of the railroad under the mortgage will not divest the land-owner's right to recover compensation for the occupancy of his land from the purchaser at the sale. "If the original occupant has so managed its card as to escape payment until it has divested itself of its interest by any form of alienation, its alienee, mediate or immediate, if it would enjoy the uncompensated right, must pay the price of it, unless it can show an equity growing out of the conduct of the owner of the soil which would estop him. It must not be forgotten we are treating of a case where the owner has done nothing to divest his right by his own act of alienation, but where the original actor stands upon a seizure at law, which must be shown to have conformed to the law in all its steps, in order to deprive the owner of his title. The mortgage was but a mode of alienation of the estate of the mortgagor, but could not operate upon the paramount claim of the land-owner over the mortgaged interest. This we have seen is not a mere lien, the judgment in the process of assessment not being the source of his right, but the means only of ascertaining the amount of his claim and of enforcing its payment. It could be extinguished only by payment or release."²

A railroad company which purchases the franchises

¹ *Hoffman's Ap.*, 10 W. N. C. 401 (1881).

² *Per AGNEW, J.*, *Western Pennsylvania R. R. v. Johnston*, 59 Pa. 290 (1868).

and property of another railroad company at a judicial sale, and uses land for which the latter company had agreed to pay the land-owner, is bound by the agreement.¹

A railroad company which has succeeded by purchase to the franchises and property of another company which originally occupied a highway, is subject to the duties and liabilities relating to the highway which rested upon the original company, and is not relieved therefrom by the statute of limitations.²

Effect of Sale on Debts Due to the Old Company.

90. The sale of a railroad property and franchises does not pass to the purchaser the debts or mere choses in action due to the company from others.³

Suit to Declare Mortgage Void.

91. If a proceeding to declare railroad bonds and mortgages void because issued in violation of article XVI, § 7 of the Constitution and Act of April 18, 1874, the bondholders must be joined as parties, and a suit against the trustees alone is insufficient to bind bondholders. GREEN, J., said: "The proceeding is aimed directly against the bonds in question, and of course assails necessarily the rights of the persons who hold them. The trustees hold their office for the benefit and protection of the bondholders, but cannot be regarded as their representatives for all purposes. Of course, if they were, if the relations between them were such as to constitute the trustees general agent or attorneys in fact in all matters relating to

¹ *Wheeling, Pittsburgh & Baltimore Railroad Co.'s Ap.*, 1 Pennypacker, 360 (1881).

² *Commonwealth ex rel. v. New York, Pennsylvania & Ohio R. R.*, 138 Pa. 58 (1890).

³ *Hogg's Ap.*, 58 Pa. 195 (1873).

the bonds, so that service of process in adverse proceedings would be binding upon the bondholders when made only upon the trustees, the contention of the appellant might be sustained. But there is nothing in that relation which makes them general agents for the bondholders as to all matters affecting the bonds. The right of the latter to own the bonds and to defend their ownership, and to defend the validity of the bonds is a right which is personal to the owners of the bonds. Whenever that right is assailed they have an undoubted right to protect themselves and their title in their own persons and by their counsel. It may be conceded that, for many purposes, the trustees do represent the bondholders, and, wherever they do, the latter are bound by their acts. The authorities cited by the appellant do not reach to the position that, in a proceeding such as this, which attacks the very validity of the bonds, the trustees may be substituted as defendants, and process served on them so as to obligate the bondholders by all the consequences of an adverse proceeding and judgment. In the absence of clear and satisfactory authority for a ruling to that effect we are unwilling to take such a step. It is true the appellant may be subject to some inconvenience in ascertaining who are the holders of the bonds, but that difficulty is not insuperable; as against the consequences which might result from allowing an adverse judgment to be taken against persons who had no notice and have never had a day in court it is not to be considered.”¹

Suit to Declare a Mortgage First Lien.

92. A decree declaring a mortgage executed by a railroad company to be the first lien on the company's property and franchises does not give it priority over the lien

¹ *Harrisburg & Eastern Railroad Co.'s Ap.*, 1 Mona. 692 (1889).

of a person who had no notice of the proceedings, and was neither a party nor a privy to the decree.¹

Conflict of Laws.

93. A contract made in New York for issue of bonds and creation of a mortgage by a corporation in violation of the Constitution of Pennsylvania prohibiting a fictitious increase of corporate debt will not be enforced in Pennsylvania.²

Deduction of Taxes.

94. A provision in a railroad mortgage that the payment shall be "without any deduction, defalcation, or abatement for any taxes," applies to taxes on the land mortgaged, and does not apply to the United States or State taxes on the debt secured by the mortgage.³

Sale of Railroad by Execution Under Judgment of Private Creditors.

95. Under the Act of April 7, 1870, the franchises and property of a railroad company may be seized and sold by *fi. fa.* This act supersedes the remedy by sequestration.⁴

Lands bought by a railroad company and not necessary for the full enjoyment and exercise of the franchises of the company are bound by lien of judgments against the company, and are liable to be levied in execution and sold by the sheriff in the same manner and with the same effect as the lands of any other debtor. Thus a canal basin

¹ *Pittsburgh, Cincinnati & St. Louis Railway v. Marshall*, 85 Pa. 187 (1877).

² *Pittsburgh & State Line R. R. Co.'s Ap.*, 4 Atl. Rep. 335 (1886).

³ *Clifton v. Phila. & Read. R. R.*, 54 Pa. 356 (1867).

⁴ *Phila. & Baltimore R. R. Co.'s Ap.*, 70 Pa. 355 (1872); *Plymouth R. R. v. Colwell*, 39 Pa. 337 (1861); *Youngman v. Elmira & Williamsport R. R.*, 65 Pa. 273 (1870); *Western Pennsylvania R. R. v. Johnston*, 59 Pa. 290 (1868).

is not a legitimate incident of a railroad having no authorized canal connection, and it may be seized and sold to satisfy a judgment against a railroad company owning it.¹

A private creditor of a railroad company may on execution sell the land of the company subject to the right of company to keep and retain its tracks upon the land, and the purchaser at such sale may have the benefit of the Act of June 16, 1836, to obtain possession of the land subject to the railroad company's rights. In *Oakland Ry. Co. v. Keenan*, WOODWARD, C. J., said: "If the case before us presented an instance of a railroad company interrupted in the exercise of its corporate franchises by the levy and sale of a private creditor, we would restrain him, and if necessary, would deny him the remedial provisions of the Act of 1836. But such is not the case; without going outside of the record, as the argument did, to discover whether the company have any charter authority to build or enjoy a railroad upon the ground in question; assuming, as we do, that the company's railroad was lawfully built, and has a right to be where it lies, the record shows that it was not built by Keenan, is not claimed by him, and no possession of it is sought. What he purchased was the company's title to the land, subject to the servitude of their right as a railroad company. So was the levy and sale, and such is the form in which Keenan must enjoy his purchase. In this state of the record, of what has the company to complain? Not of deforcement from any premises that are essential to their corporate existence, for they are expressly saved. Not that land held by them beyond their corporate necessities was levied and sold, for corporations hold all such lands subject to the legal process of their

¹ *Plymouth R. R. Co. v. Colwell*, 39 Pa. 337 (1861).

creditors in the manner of other debtors. Not that the proceedings were had under the Act of 1836, for it expressly includes corporations, and the proceedings were in substantial accordance with its provisions. In a word, if the case be judged by the record, and we know of no other way of judging it, some of the questions suggested by the assignment of errors did not arise, and of nothing that was done has the company any just cause of complaint.

“As a consequence of holding the Act of 1836 applicable to corporations, it may be that inconveniences may result to railroad companies; for possibly levies and sales may be made of necessary appurtenances, and the freeholders’ court may sever them and deliver them to the purchasers. If there is danger of this, the legislature can remedy it by providing that the courts shall ascertain and fix the necessary curtilage of railroad companies, after the manner of the Mechanics’ Lien Law, before a creditor shall be permitted to make his levy.”¹

¹ 56 Pa. 198 (1867).

CHAPTER VI.

STATUS OF FOREIGN CORPORATIONS.

96. Foreign Corporations.

Foreign Corporations.

96. A foreign corporation authorized to construct a portion of its road in the State has the same rights and privileges as a domestic corporation.¹

A railroad company incorporated under the laws of another State cannot acquire and hold real estate within Pennsylvania unless it has been specially authorized by law to hold such property. In the absence of such authority, the holding of land is illegal and subject to escheat under the Act of April 26, 1855.²

A foreign railway corporation, having no license to hold mineral land in this State, may, however, own the controlling interest in the stock of the mining company chartered under the laws of this State. A foreign railway company, having no license to hold mineral lands in this State, caused its president to purchase such lands by an agreement in his own name, furnishing to him the money required for a hand payment made on the contract; it then purchased the charter of a Pennsylvania mining corporation, authorized to hold such lands, and retained all its capital stock, except a few shares to qualify direc-

¹ *New York & Erie R. R. Co. v. Young*, 33 Pa. 175 (1859).

² *Com. v. New York, Lake Erie & Western R. R.*, 114 Pa. 340 (1886).

tors. The contract of the purchase of said lands was thereupon assigned to said mining company, which subsequently received from the vendor a conveyance of the legal title; the mining company afterward acquired the stock of another mining company, and conveyed the lands to the latter. A proceeding to escheat the lands was commenced in 1884, after these conveyances were made. In such case, when the facts are undisputed, the court should declare their effect as matter of law: the holding by the carrier company of the stock of the mining company was authorized by the Act of April 15, 1869, P. L. 31: the transaction did not constitute an unlawful "device" within the meaning of section 5, Act of April 26, 1885, P. L. 329: and, in any event, the Act of April 8, 1881, P. L. 9, was a bar to the proceeding: *Commonwealth v. N. Y., etc., R. Co.*, 114 Pa. 340, overruled.¹

A railroad company incorporated in another State is a citizen of the State where it was incorporated within the meaning of the Act of Congress 1789, which gives the right to remove a case from the State to the Federal courts "where the suit is between a citizen of the State where the suit is brought and the citizen of another State."²

The status of a corporation acting under charters from two States is that of an association incorporated in and by each of the States, and when acting as a corporation in either of the States, it acts under the authority of the charter of the State in which it is then acting, and that only, the legislation of the other State having no operation beyond its territorial limits.

In *Rothschild v. Rochester & Pittsburgh R. R. Co.*

¹ *Commonwealth v. New York, Lake Erie & Western R. R.*, 132 Pa. 591 (1890).

² *Wheeden v. Camden & Amboy R. R.*, 1 Grant, 419 (1856).

bonds were issued by a railroad company having a charter both from New York and Pennsylvania. The issue of the bonds involved such an increase of indebtedness as was forbidden by art. xvi, § 7, of the Pennsylvania Constitution. Foreclosure proceedings were had in New York under the mortgage given to secure the bonds, and a decree was entered ordering the sale of the road. The court held that the decree was ineffective to pass title to the property of the company in Pennsylvania. MAYER, J., said: "Although by the terms of the consolidating acts of the two States, the consolidating corporations are 'deemed and taken to be one corporation,' yet it has no legal existence in either State, except by the laws of the State, and the consolidated company, so far as the regulation and control of its corporate property is concerned, must necessarily be subject to the Constitution and laws of such State, unless such control and supervision have been surrendered. So that when the consolidating corporations become one corporation by the co-operating legislation of the two States, it was subject to all the provisions of the Constitution and laws of Pennsylvania, and 'all the restrictions, disabilities, and duties of each of such consolidating corporations:' *vide* Consolidation Act of Pennsylvania of 1865. My conclusions upon the whole case are:

"1. That this bill can be maintained by the present plaintiffs, who are stockholders of the Rochester & Pittsburgh Railroad Company.

"2. That the issuing of the bonds and the creation of the mortgage were in contravention of the policy of this State, as declared in her Constitution and the laws passed to enforce it, and are therefore illegal and void, and the lien of the mortgage did not bind the property of the corporation in Pennsylvania.

"3. That the proceedings had in the Supreme Court of Monroe County, New York, for the foreclosure of the mortgage were local in their character, and can have no extra-territorial effect.

"4. That the decree, sale, and the deed made in pursuance of it, are ineffective to pass the title of the corporate property in Pennsylvania to Adrian Iselin, the purchaser, or his vendees, the Pittsburgh & State Line Railroad Company.

"5. That the decree foreclosing the equity of redemption of the mortgagor had only the effect of foreclosing its equity of redemption in the mortgaged premises in the State of New York.

"6. That such decree is not conclusive upon the rights of the plaintiffs, as the courts of the State of New York had no jurisdiction to pass upon the validity of the mortgage as to the property of the corporation in Pennsylvania.

"7. That although the issuing of the bonds by the corporation while acting in the State of New York was a valid corporate act in that State, and could be enforced there, yet such contract, being repugnant to the policy of this State in regard to the increase of 'indebtedness' of corporations, cannot be recognized or enforced by the courts of this State, and that the adjudication by the courts of New York State upon the validity of the bonds would not be binding and conclusive upon the courts of this State."¹

¹ 1 Pa. C. C. R. 620 (1886).

CHAPTER VII.

EMINENT DOMAIN—GENERAL PRINCIPLES.

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| 97. Land Can Only be Taken for Public Use. | 99. Delegation of Power of Eminent Domain. |
| 98. Change of Use. | 100. Nature of the Estate Acquired. |

Land Can Only be Taken for Public Use.

97. A railroad company can only be incorporated for a public use, and its articles of association must designate such termini as shall indicate a public character. Thus a railroad will not be incorporated to connect two manufacturing establishments. In Pittsburgh Transfer Railroad Company's application for a charter the road was described as to extend "from on or near the premises of Jones & Laughlin, in the Twenty-fourth Ward, Pittsburgh, to or near the premises of Atterbury & Co., in the Thirtieth Ward, Pittsburgh, along and over Wharton, South, Twenty-third, Mary, and Breed Streets, and other streets and alleys in the said city of Pittsburgh." The application for a charter was refused. SYODGRASS, Dep. Att'y-General, saying: "Upon its face the purpose seems to be to connect two manufacturing establishments, both of which lie within the limits of the city of Pittsburgh. If such a railroad were in fact constructed, it is difficult to see what 'existing public need' it could supply or how it could be operated except for private purposes. Aside, therefore, from the fact that it lies wholly within the city of Pittsburgh and is to be constructed entirely upon her public streets and alleys, I

do not think that the contemplated railroad is so plainly 'for public use' as to bring it within the provisions of the Acts of 1868.

"There is, however, another objection. The Act of 1868 requires the places from and to which the road is to be constructed, maintained, and operated to be stated in the articles of association; that is, every railroad within the Act of 1868 must have such termini as will indicate its public character. As I read the act I do not understand a street corner, a particular building, or manufacturing establishment to be a place within its meaning. The word 'place,' I think, rather means the designation of some location, as a city, town, or village which will suggest the public use for which the railroad is to be constructed.

"A railroad to be constructed and operated from the house of B to the house of C would imply a private rather than a public use, and hence the legislature very properly required the articles of association to designate such places as termini as would indicate the public character of the contemplated improvement. This the present application does not do, since, as already said, the designation of two manufacturing establishments as termini indicates a private rather than a public use, and renders it objectionable for want of proper termini within the meaning of the Act of 1868."¹

A railroad company was prohibited from holding land except for "the construction of the road or for depots, toll-houses, and other necessary works." The company was authorized "to make, erect, and establish all works, edifices, devices that may be deemed expedient," and to enter upon "any land," the road not to be more than "five rods wide." It was held that the company could only take

¹ 1 Pa. C. C. R. 411 (1886).

land to the width of five rods for its road, and land for such erections as were necessary for the railroad as such, but that this did not include a warehouse.¹

Although a railroad company cannot use land condemned under the right of eminent domain for any but a public use, yet it may have a reasonable time, measured by all the attending circumstances, to plan and perfect the arrangement for the proper use of the land. Thus an action of ejectment brought only four days after the final determination of the value of the easement will not be sustained although the plaintiff alleges that the land was occupied for its private use.²

Change of Use.

98. The property which has been condemned by a railroad company under the right of eminent domain must be held in accordance with and for the purposes which justified its taking. Thus a railroad company cannot erect dwelling-houses and mills in its right of way; nor can it use its right of way as a place upon which to deposit coal-dirt from a mine. In *Lance's Appeal*,³ THOMPSON, J., said: "The right of the commonwealth to take private property without the owner's assent on compensation made, or authorizing it to be taken, exists in her sovereign right of eminent domain, and can never be lawfully exercised but for a public purpose—supposed and intended to benefit the public, either mediately or immediately. The power arises out of that natural principle which teaches that private convenience must yield to the public wants. This public interest must lie at the basis of the exercise, or it would be confiscation and usurpation to ex-

¹ *Cumberland Val. R. R. v. McLanahan*, 59 Pa. 23 (1868).

² *Ross v. Pennsylvania R. R.*, 4 Atl. Rep. 850 (1886).

³ 55 Pa. 16 (1867).

ercise it. This being the reason for the exercise of such power, it requires no argument to prove that after the right has been exercised the use of the property must be held in accordance with and for the purposes which justified its taking. Otherwise it would be a fraud on the owner, and an abuse of power. Hence it is that no one can pretend that a railroad company may build private houses and mills, or erect machinery, not necessarily connected with the use of their franchise, within the limits of their right of way. If it could, stores, taverns, shops, groceries, and dwellings might be made to line the sides of the road outside of the track—a thing not to be thought of under the terms of the acquisition of the right of way. The exercise of the right of eminent domain, whether directly by the State or its authorized grantee, is necessarily in derogation of private right, and the rule in that case is that the authority is to be strictly construed: *Dwarris on Stat.* 750; 2 *Casey*, 355; 7 *Harris*, 211. What is not granted is not to be exercised. When, therefore, the *Lackawanna & Bloomsburg Railroad Company*, under its charter, and the promoter of the private railroad under the Act of 1832, were authorized to take private property for the use of their roads, the rights they acquired were a right of way and facilities necessary to the efficient use of the right. They were not empowered to use the exclusive right of way granted to each for any other independent purpose than that for which it was granted. The fee remained in the private owner, and outside of the authorized use, which must be public or incidental to the public use, the proprietary right is in the original owner: 1 *Barr*, 336; 8 *Barr*, 294; 6 *W. & S.* 378; *Redf. on Railways*, 69. Upon these principles, without further elaboration, we think the court was right in holding the defendant bound to remove the deposits of

dirt placed by him or under his authority from both roads, and most assuredly from the ground covered by it outside of them."

When a turnpike company, having merely the right of way over land, lays railroad tracks along the line of its road, it is liable for damages to the owner of the land. Even if the claimant had given a release of damages to the turnpike company, it would still be liable on changing a road that could be used by the whole neighborhood into one merely beneficial to the company. The claimant should be allowed for the future damages to his property that would result from the ordinary use of the railroad; the company would then be liable only for gross carelessness.¹

The sale of the canal in pursuance of the Act of 1858, passed to the purchaser all the property and franchises of the commonwealth in the canal, and a subsequent change of its use, and the occupancy of it for other purposes does not impair the title of the vendee. Hence the Philadelphia & Erie Railroad Company, having become the owners of a part of said canal, from Lock Haven to the mouth of Loyalsock Creek, cannot be restrained from laying their railroad tracks over and across the streets which have been traversed and crossed by the canal.²

Delegation of Power of Eminent Domain.

99. A railroad company cannot delegate its power to build a railroad to an individual; and if an individual under such an arrangement attempts to build a road, he may be restrained by the owner of the land upon which he attempts to enter. "It is well settled," said THOMP-

¹ *Mumma v. Harrisburg, Portsmouth, Mount Joy & Lancaster R. R.*, 1 Pearson, 24 (1851).

² *Williamsport v. Pennsylvania R. R.*, 8 Pa. C. C. R. 350 (1890).

SON, J., "that charters are to be strictly construed; what is granted may be exercised, but nothing is to be taken by implication. The grant of corporate authority is a trust, and to be executed in the same spirit of fairness toward the public as it would be by the State herself, and hence it may not be sold or assigned without express authority. The corporators undertake to stand in the shoes of the commonwealth, and what they have undertaken to do they must do; they cannot alienate authority and control in favor of private parties, or to agents responsible or irresponsible. If the New Castle & Franklin Railroad Company had power to let the portion of their road in question, to be constructed and used by a private party for private uses exclusively, for an indefinite period, there is nothing to limit the principle to one such contract; there might just as well be fifty, and the whole line be farmed out to private purposes, in manifest disregard of the duty owing by the corporators to the State. The discretion which the company was to exercise in performing their undertaking under the charter would thus pass to parties to whose discretion the State committed no charge. Authority to make such a contract is not within the provision of the act of incorporation; and as it is without authority and against the policy of the law, it must be void. The authority to construct a road for the use of the public cannot be turned into an authority to construct a private road. Sometimes contractors agree for the profits of running a road as far as made and just as made for their own benefit, but always for the purposes of its charter and never to exclude the public. This is not this case. The public are entirely excluded, not only by the kind of road and rolling stock on it, but by the agreement itself, and not only so, the right of eminent domain was exercised here, in substance and essence, for the pur-

poses that were private, and the plaintiff's property taken for such purpose. This is all wrong and requires to be redressed. The defendant therefore being without right or title in the occupancy of the alley in question for the use of his railway, and the plaintiff's title in it admitted, it is manifest that the running of coal-cars in and along it with steam locomotives, several times a day, creating dust, dirt, and smoke, is prejudicial to the plaintiff's property and should be prevented."¹

A manufacturing company cannot acquire by a lease from a railroad company the right of eminent domain vested in the latter, so as to be enabled to construct and operate a railway upon the streets of a borough, even with the consent of the municipal authorities.²

Nature of the Estate Acquired.

100. The estate acquired by a railroad company in condemnation proceedings is more than a mere easement or right of way; it is a right to exclusive possession, to fence it, to build over the whole surface, to raise and maintain any appropriate superstructure, including necessary foundations, and to deal with it within the limits of railroad uses as absolutely and as uncontrolled as an owner in fee.³

The owner of the soil retains the enjoyment of the fee, subject to the right of way of the railroad; he is therefore entitled to place pipes under the railroad for the conveyance of oil if such use does not imperil the easement of the railroad company.⁴

In a railroad charter the term "land" has its common

¹ *Stewart's Ap.*, 56 Pa. 413 (1867).

² *Barker v. Hartman Steel Co.*, 129 Pa. 551 (1889).

³ *Pittsburgh, Ft. Wayne & Chicago Ry. v. Peet*, 152 Pa. 488 (1893); *Pennsylvania Schuylkill Valley R. R. v. Reading Paper Mills*, 152 Pa. 492 (1893).

⁴ *Hanson v. Oil Creek & Allegheny River R. R.*, 8 Phila. 556 (1871).

law and technical meaning as comprehending all structures upon its surface.¹

A municipality has no right to authorize the erection of a building upon a street under which a railroad company has constructed a tunnel. A railroad company made a deep cut in a public highway, and then arched over its track and placed two or three feet of soil over the crown of the arch. After the railroad was constructed, the highway was no longer used as a street. Subsequently an ordinance was passed permitting a congregation to erect a chapel over the arch of the tunnel, but the ordinance provided that the chapel should be removed upon thirty days' notice. It was held that the railroad company had the exclusive right to the land, and that the ordinance had no legal effect.²

The fact that a public road has been laid out and an order to open it placed in the hands of the supervisors, will not justify them in digging away embankments or injuring or destroying abutments of a railroad, constructed or in process of construction, which may be found in the line of the road. Such acts would be contrary to law and prejudicial to the rights of the company, and a court of equity will restrain them by injunction.³

¹ *Cleveland & Pittsburgh R. R. v. Speer*, 56 Pa. 325 (1867).

² *Junction R. R. v. Boyd*, 1 Leg. Gaz. Rep. 107 (1871); 8 Phila. 224.

³ *Williamsport & North Branch R. R.*, 4 Pa. C. C. R. 588 (1888).

CHAPTER VIII.

CONDEMNATION PROCEEDINGS.

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| 101. The Petition. | 113. Change of Venue. |
| 102. The Report. | 114. Excessive Damages. |
| 103. Bonds—Effect of Filing Bond. | 115. Execution. |
| 104. Informalities in Execution of Bond. | 116. Appeals. |
| 105. Authority to File Bond. | 117. Time Within which Appeal Must be Taken. |
| 106. Stipulation in Bond. | 118. Right to Appeal Relates to the Remedy. |
| 107. Additional Security. | 119. When Judgment of Lower Court is Final. |
| 108. Qualifications of Viewers. | 120. Withdrawal of Appeal. |
| 109. View of Premises. | 121. Appeal by Heir. |
| 110. Notice to Land-Owner. | 122. Statute of Limitations. |
| 111. Question of Title. | |
| 112. Miscellaneous Matters of Practice. | |

The Petition.

101. The names of the owners should appear on the petition and the fact that the company could not agree with them as to compensation, or they were absent, or incapacitated should be verified by affidavit.¹ If the original petition fails to state the absence of the owner from the State, or the inability of the owner and the company to agree upon the damages, the defect may be cured by an amended petition filed before the view *is had*.² Where the inability to agree with the owner is stated in the petition, and an affidavit of an agent of the com-

¹ *Reitenbaugh v. Chester Val. R. R. Co.*, 21 Pa. 100 (1853); *Drexel v. Philadelphia, Wilmington & Baltimore R. R.*, 7 Phila. 561 (1870).

² *Pennsylvania R. R. Co. v. Porter*, 29 Pa. 165 (1857).

pany is appended to the effect that he was unable to agree with the land-owners, it is a necessary implication that he made the effort and was unsuccessful.¹

Under the Act of March 27, 1848, regulating the manner in which damages to land taken by the Pennsylvania Railroad Company should be assessed, the court could not grant a view until it appeared that the company had located, marked, and surveyed the land they proposed to take, and that they had made an effort to agree with the owner for the compensation. These matters must be verified by affidavit.²

All of the specific items of injury need not be set forth in the petition. Thus it is not necessary to aver that the meadow or grass in a field below the railroad embankment was injured by earth being carried thereon from the embankment. Such an injury, the court held, was one that would naturally result from the general cause of complaint as set forth in the petition.³

The petition must show the public purpose for which the land is taken; thus a petition which sets forth an appropriation of land for the necessary purpose of putting down additional tracks and otherwise using it in the maintenance and operation of the road is fatally defective, inasmuch as it does not sufficiently define the public purpose for which the land is taken.⁴ The petition should not contain the amount of the bond given to secure the damages.⁵ A draft of land intended to be taken by a railroad company need not state the kind of buildings or other improvements upon the land.⁶

¹ *Tucker v. Erie & North East R. R. Co.*, 27 Pa. 281 (1856).

² *O'Hara v. Pennsylvania R. R. Co.*, 25 Pa. 445 (1855).

³ *Philadelphia & Reading R. R. v. Gilson*, 8 Watts, 243 (1839).

⁴ *Shick v. Penna. R. R.*, 1 Pearson, 259 (1866).

⁵ *Wilson v. Penna. R. R.*, 7 Mont. Co. L. Rep. 46 (1891).

⁶ *Shick v. Penna. R. R.*, 1 Pearson, 262 (1867).

The court may allow the petition to be amended.¹ Where a petition is amended the plaintiff is not precluded by the amount claimed in the petition before it was amended, although it is persuasive evidence to the jury of the estimate the plaintiff had himself put upon his damages.²

A petition for the appointment of viewers described the land condemned as a tract in Windsor Township of about ten acres. At the trial the property was shown to contain about sixty-five acres, and to be partly in Windsor Township and partly in the borough of Hamburg. It did not appear that the defendant was taken at a disadvantage by the admission of the evidence or that he was injured by it. It was held that the variance between the petition and proof was not sufficient ground for a new trial.³

A petition for the appointment of viewers under the corporate seal of the railroad company and signed by the attorney of the corporation is sufficient, although the petition is not signed by an officer of the company.⁴

The Report.

102. The land must be so described that its identity cannot be questioned. In *Pennsylvania R. R. Co. v. Porter*,⁵ KNOX, J., said: "In *O'Hara v. The Pennsylvania Railroad Company*,⁶ a report of viewers was set aside at the instance of the land-owner, because there was not a full description of the land taken by the railroad company;

¹ *Penna. & New York R. R. and Canal Co. v. Bunnell*, 81 Pa. 414 (1876).

² *Penna. & New York R. R. and Canal Co. v. Bunnell*, 81 Pa. 414 (1876).

³ *Phila. & Reading R. R. v. R. & P. R. R.*, 12 Pa. C. C. R. 513 (1892).

⁴ *Tucker v. Erie & North East R. R. Co.*, 27 Pa. 281 (1856).

⁵ 23 Pa. 165 (1857).

⁶ 23 Pa. 445 (1855).

and in *Zach v. The Pennsylvania Railroad Company*,¹ the report gave the length and breadth of the strip of land taken, and stated that the value of the land was embraced in the damages awarded. A plot or draft was also annexed to the report. The report was set aside because the quality and value of the land was not specifically stated.

"These cases show that where the company is the petitioner the proceedings are closely scrutinized, and there is no reason why we should be more lenient to proceedings commenced and conducted by the other party. At all events, in every case, the land taken should be so described, either in the petition or in the report, that its identity would not be questionable. There is no hardship in requiring this to be done, for the viewers must know the length and breadth and precise locality of the land in order to state the quantity, quality, and value. Where there is any difficulty in describing the land the railroad company, upon application, ought to furnish the petitioner or the viewers with a correct description, and in case of a refusal no exceptions, founded upon the absence or inaccuracy of description, would be listened to on behalf of the corporation."

If the report of viewers sets forth the adjoiners and boundaries with a draft showing the length, breadth, courses, and distances of the land taken, without a calculation of the contents, the quantity of land taken is sufficiently stated.²

The quality of the land condemned is sufficiently described in a report of viewers by stating that it is land in the town of Columbia, used for a lumber-yard.³

¹ 25 Pa. 394 (1855); *Reitenbaugh v. Chester Val. R. R. Co.*, 21 Pa. 100 (1853) See *Philadelphia, Wilmington & Baltimore R. R. v. Trimble*, 4 Wharton, 4 (1838).

² *Pennsylvania R. R. Co. v. Bruner*, 55 Pa. 318 (1867).

³ *Pennsylvania R. R. Co. v. Bruner*, 55 Pa. 318 (1867).

The viewers must state in their report that they made just allowance for advantages which may have accrued to the land, or that they made a fair and just comparison of the advantages and disadvantages.¹

The report need not set forth the presence of the parties at the view, nor that witnesses were called and sworn. It will be presumed that the action of the viewers was regular. If there was any irregularity in respect to those matters, the remedy is confined to the Common Pleas, where the facts may be shown by evidence *in pais*.²

It is no objection to the report of viewers that the jury located the railroad instead of the company, although the act provided that the company shall locate and the court may approve on the jury's report.³

Damages may be assessed in a gross sum without the viewers apportioning it among the joint tenants according to their respective interests in the land taken. If the railroad company pays the damages, it does not matter how they may be divided among those entitled.⁴

If the report finds the value of the lands taken and the amount of damages sustained by reason of the location and construction of the road, it is unnecessary to state in detail how the damages accrued, whether by injury to buildings, or to lands by reason of increased expenses in fencing.⁵ But if an act requires the viewers to value the property taken, or damages done, and to state

¹ Philadelphia & Erie R. R. v. Cake, 95 Pa. 139 (1880).

² Pennsylvania R. R. Co. v. Porter, 29 Pa. 165 (1857).

³ Philadelphia & Trenton R. R. Co.'s Case, 6 Wharton, 25, 42 (1840).

⁴ Pittsburgh & Steubenville R. R. Co. v. Hall, 25 Pa. 336 (1855). But one report may embrace awards to different owners: Tucker v. Erie & North West R. R., 27 Pa. 281 (1856).

⁵ Tucker v. Erie & North East R. R. Co., 27 Pa. 281 (1856). See Patten v. Susquehanna R. R., 1 Pearson, 48 (1854); Western Pennsylvania R. R. v. Hill, 56 Pa. 460 (1867); Lodge v. Railroad Co., 9 Phila. 543 (1872).

the amount of benefit conferred and the difference between the damages done to the property, taking into consideration the advantages and disadvantages, an award finding a gross sum due to the owner, without referring to the advantages to the owner, is insufficient.¹

Viewers cannot make two distinct or alternative awards and throw upon the court the burden of deciding upon which of them judgment shall be entered.² A report may be referred back to the viewers to correct a clerical error.³

Bonds—Effect of Filing Bond.

103. After the railroad company files a bond the owner can recover damages only. His interest in the land is divested.⁴

After security has been entered, the only remedy of the owner of the land is upon the bond, and if subsequently the property and franchises of the company are sold under foreclosure proceedings, the owner of the land whose bond has not been paid is not entitled to payment out of the fund realized by the sale. "It is contended that the land-owner retains his grasp upon the property until he has actually received compensation for the use to which it has been applied. The answer to this position is, while the people might have so provided in their fundamental law, they have not done so. On the contrary, they have ordained, as we have seen, that private property may be taken for public use upon giving security for the payment of just compensation to the owner; and the kind of se-

¹ *Ohio & Pennsylvania R. R. Co. v. Wallace*, 14 Pa. 245 (1850).

² *Bate v. Philadelphia, Norristown & Phoenixville R. R.*, 1 *Montgomery County L. Rep.* 47 (1883).

³ *Pennsylvania R. R. Co.'s Ap.*, 2 *Walker*, 506 (1877).

⁴ *Philadelphia & Reading R. R. v. Lawrence*, 1 *Leg. Chron. Rep.* 371 (1873); 31 *Leg. Intell.* 79.

curity, as well as the manner in which it shall be given and enforced, has been prescribed by law."¹

After a bond had been given by a railroad company to secure a land-owner, the latter cannot sustain a bill in equity to restrain a completion of the railroad, on the ground that both the company and sureties in the bond have become insolvent. "The sufficiency of the sureties is to be decided by the court, where the parties do not agree respecting them, and if the court decide them sufficient, that is an end of the question. There is no further condition that they must remain sufficient. If there was such a condition, then the company's right to take property upon giving security would be valueless. It would be no right at all. The only right to take private property for public use, then would be to pay the owner the just compensation. Until actual payment the owner would retain his grasp on the property. The right to take the property on giving security cannot be reasoned away in such a manner. 'Sufficient sureties,' as used in the Act of 1856, does not mean sureties who will not or cannot become insolvent. If it did, then no such bond as the act requires would ever be given, because there are no such sureties."²

The claim for damages is a personal debt, and does not run with the land.³ If the owner sells the land after the damages have accrued, and the railroad company settles with the purchaser, the original owner may recover them from the railroad company.⁴

¹ Per STERRETT, J., in *Sellers' Ap.*, 118 Pa. 512 (1888); *Fries v. Southern R. R. & Mining Co.*, 85 Pa. 73 (1877).

² *Wallace v. New Castle, etc., R. R.*, 138 Pa. 138 (1890).

³ *Blackiston's Ap.*, 32 P. F. Smith, 339 (1876); *Zimmerman v. Union Canal Co.*, 1 W. & S. 346 (1841).

⁴ *McFadden v. Johnson*, 72 Pa. 335 (1872); *Schuylkill Nav. Co. v. Decker*, 66 Pa. 409.

The approval of a bond settles nothing as to the question whether the railroad company has the right under its charter to appropriate the land.¹

The bond filed by the railroad company is a security for all damages that may be done, either by the location of the road or its construction.²

The offer of a bond and its approval by the court is an adjudication that an attempt has been made to come to an agreement with the owner as to the amount of damages.³

Informalities in Execution of Bond.

104. The want of formal attestation of the seal of the company and the signature of the president does not render the bond invalid. These may be proved otherwise. In a suit on the bond, the proof of the handwriting of the president, taken in connection with the recital in the body of the instrument of its seal, would be sufficient for the jury to conclude that the seal was affixed by him.⁴ Objection to a bond on the ground of informality in the execution should be made at the time of its presentation.⁵

Authority to File Bond.

105. Authority for filing the bond is to be presumed in the first instance from its execution and presentation for approval, and after the corporation proceeds under it to take the land, they will be estopped from denying the authority under which it is filed.⁶

¹ *Getz v. Philadelphia & Reading R. R.*, 1 Walker, 427 (1879).

² *Wadhams v. Lackawanna & Bloomsburg R. R. Co.*, 42 Pa. 303 (1862).

³ *Wadhams v. Lackawanna & Bloomsburg R. R. Co.*, 42 Pa. 303 (1862).

⁴ *Myers v. Delaware, Lackawanna & Western R. R.*, 2 Delaware County, 384 (1881).

⁵ *Myers v. Delaware, Lackawanna & Western R. R.*, 2 Delaware County, 384 (1881).

⁶ *Myers v. Delaware, Lackawanna & Western R. R.*, 2 Delaware County, 384 (1881).

After a bond has been approved the court will not subsequently, on a rule to strike the bond from the files, receive testimony tending to show that the corporation was proceeding in excess of its powers. Objections on such grounds should have been made when the bond was presented for approval.¹

Stipulation in Bond.

106. If a railroad company stipulates on the back of a bond given to secure land damages that a certain deduction shall be made per acre, and for fencing, if from any cause the quantity of land and amount of fencing should be lessened, the company may show in an action on the bond a change of location lessening the quantity of land taken and the amount of fencing required.²

Additional Security.

107. Where a bond to secure compensation to a land-owner for land taken by a railroad company under the Act of April 9, 1856, and art. xvi, § 8, of the Constitution, has been filed and approved by the court, and the company has entered and constructed its road over the land the court has no power to require the company to give additional security where it is afterward discovered that the sureties in the original bond are insolvent and the assessment of damages exceeds the amount of the bond. If the land-owner had no notice of the presentation of the bond to court for approval and the court had been misled to believe that notice had in fact been given a different question would be presented. But the decree of the court approving the bond raises a presumption of

¹ *Myers v. Delaware, Lackawanna & Western R. R.*, 2 Delaware County, 384 (1881); *Bonstorch v. Delaware & Hudson Canal Co.*, 3 Luzerne Legal Obs. 368.

² *Wilmington & Reading R. R. v. High*, 89 Pa. 282 (1879).

notice, and to overcome this presumption the denial of notice must be most explicit. And the application for relief must be without laches.¹

Qualifications of Viewers.

108. A party knowing of a legal objection to a viewer must make it before the report is made.² A viewer who has a claim against the company for damages for changing a county road so as to pass through his land, is not disqualified to serve. Only those persons are disqualified whose property immediately adjoins the railroad.³ A viewer who has expressed an opinion as to a former and somewhat similar case is not disqualified to serve on the view.⁴ A man seized of real estate in right of his wife is not a freeholder, and cannot be a viewer to assess damages caused by the building of a railroad.⁵

View of Premises.

109. After the jury has been impaneled and sworn on an appeal from an award of viewers, the court may direct a view of the premises by the jury.⁶

If a view is desirable, a jury should be struck. The court is not bound to grant a view where one of the parties object. In a recent case the court said: "The court was not bound to direct the jury to go upon the premises. Such an order is often made, and, as a general rule, it is often desirable that the jury should visit the premises, but

¹ *Welsh v. New Castle Northern R. R.*, 6 Pa. C. C. R. 56 (1889).

² *Patten v. Susquehanna R. R.*, 1 Pearson, 48 (1854); *Newbecker v. Susquehanna R. R.*, 1 Pearson, 57 (1854).

³ *Newbecker v. Susquehanna R. R.*, 1 Pearson, 57 (1854).

⁴ *Gingrich v. Harrisburg, Portsmouth, Mt. Joy & Lancaster R. R.*, 1 Pearson, 74 (1854).

⁵ *Patten v. Susquehanna R. R.*, 1 Pearson, 48 (1854).

⁶ *Traut v. New York, Chicago & St. Louis R. R.*, 1 Mona. 394 (1888).

there is no legal obligation on the part of the court to make the order upon the mere application of one party against the objection of the other. If a view is desired it can generally be had by means of a struck jury, under the rules of practice which relate to that subject."¹

Viewers who are sent to examine land cannot make up their verdict from the view in disregard of the evidence. The purpose of the view is simply to enable them the better to understand the testimony. The court said: "The jurors were sworn to render a true verdict according to the evidence. It was never intended that the view of the jury should be substituted for the evidence, and that they should make up their verdict from the view in disregard thereof. The object of the view is, as was correctly said by the learned judge, to enable them the better to understand the testimony; to weigh conflicting testimony, and thus aided, to arrive at a sound and just conclusion. Controlled by these principles, the view of a jury may often be of great service in such cases."²

A jury that has viewed the ground should, in estimating the damages, consider the testimony of the witnesses in connection with the facts as they appeared upon the view, and upon the whole case as thus presented ascertain the difference between the market values of the property immediately before and immediately after the taking. In such a case it is not error to instruct the jury as follows: "In addition, you are what is called a struck jury. You were taken upon the ground, and had the opportunity to view and examine the premises yourselves. This was

¹ *New York, Chicago & St. Louis Ry. v. Price*, 4 Pennypacker, 200 (1884).

² *Flower v. Baltimore & Philadelphia R. R.*, 132 Pa. 524 (1890); s. c. 3 Del. Co. Rep. 582 (1889); *Hoffman v. Bloomsburg & Sullivan R. R.*, 143 Pa. 503 (1891); *Griffin v. Pennsylvania Schuylkill Val. R. R.*, 1 Montgomery Co. Rep. 169 (1885); *Hartman v. Pennsylvania Schuylkill Val. R. R.*, 22 W. N. C. 84 (1888).

done in order that you might be aided in coming to a correct conclusion as to the contention between the parties. In ordinary cases, the jury is to be governed by the testimony of the witnesses examined in their presence; and, while you have been qualified to give a true verdict according to the evidence, that evidence consists of what you have seen on the ground, as well as the testimony of the witnesses who have been examined during the trial before you in court. What you observed on the view then, you must remember as a part of the evidence in the case. The statements of the witnesses who have testified must be considered, but you are not bound to be controlled thereby, if your own examination of the premises leads you to a different conclusion. You are to judge of the amount of damages suffered by the plaintiff, from the inspection you made of the premises, as well as from the opinions of others, who have made an examination and gave you their opinions under oath. What you saw on the ground, therefore, and what you have heard from the witness stand, should be the basis of your conclusion.”¹

Notice to Land-Owner.

110. The owners need not be summoned to answer the petition, but it is good practice to notify them of the proceedings before viewers are appointed. Notice of the time and place of the meeting of the viewers on the premises must be given to the owner, and evidence of such notice must be produced before the viewers and returned with their report.²

Under the Act of March 27, 1848, it was not necessary that the owner of the land should have notice of the

¹ *Gorgas v. Philadelphia, Harrisburg & Pittsburgh Ry.*, 144 Pa. 1 (1891).

² *Reitenbaugh v. Chester Val. R. R. Co.*, 21 Pa. 100 (1853).

presentation of the petition and the appointment of viewers.¹ If he had no notice he could object to the preliminary proceedings after the report was returned.²

Where the owner is absent or incapacitated the court must appoint a guardian or make such decree or order as may be necessary to protect the interests to be affected.³

It is not essential to the validity of proceedings for the approval of a bond to secure compensation to a land-owner for land taken by a railroad company under the Act of April 9, 1856, and art. XVI, § 8, of the Constitution, that the record should show that notice was given to the land-owner. The decree of the court is *prima facie* evidence that *omnia rita acta*, and throws the burden of proving the contrary on the complainant. A written notice handed to the land-owner is sufficient. It is not necessary that he be informed of the contents.⁴

Question of Title.

111. Viewers of damages for right of way may pass upon the title to land so far as to determine who are entitled to the damages.⁵ Plaintiffs' title is a proper subject of inquiry by the jury, and the presumption is that in the absence of all proof to the contrary plaintiff proved his title to the satisfaction of the jury.⁶

An objection that the petitioner is not an "owner" within the meaning of the act must be made at the time of the appointment of the viewers, or on an appeal under

¹ *Zack v. Penna. R. R. Co.*, 25 Pa. 394 (1855).

² *O'Hara v. Penna. R. R. Co.*, 25 Pa. 445 (1855).

³ *Reitenbaugh v. Chester Val. R. R. Co.*, 21 Pa. 100 (1853).

⁴ *Bryant v. New Castle R. R.*, 6 Pa. C. C. R. 53 (1889).

⁵ *Winebiddle v. Penna. R. R.*, 2 Grant, 32 (1852). See *Heise v. Penna. R. R.*, 62 Pa. 67 (1869).

⁶ *Directors of the Poor v. Wrightsville, York & Gettysburg R. R. Co.*, 7 Watts & Serg. 236 (1844).

the Act of April 27, 1855, taken from their report. It cannot be heard upon mere exceptions to the report.¹

In *Church v. Northern Cent. Ry. Co.*,² THOMPSON, J., said: "It is contended by the counsel for the plaintiff in error, that the action of the court below was erroneous, and that the only remedy for errors not appearing on the face of the proceedings, was by appeal under the Act of April 27, 1855, which provides for an appeal in proceedings thereafter instituted under the Act of February 19, 1849, and that the quantum of the title in the petitioner could only appear by evidence *dehors* the record. It is difficult to see how this can be successfully gainsaid. The Act of Assembly, and the practice under it, requires only that the petitioner set forth that he or she is the owner of the premises alleged to be injured, as was done here. We think that if the party against whom the application is made does not, at the time of the application for the appointment of viewers object to the quantum of interest or title set forth by the petitioner, he is concluded as to that matter, unless there is a special right of inquiry into it given by statute, or he takes an appeal, when the trial being according to the forms of the common law, the whole case will be passed upon *de novo*, and can be fully brought up for review if deemed expedient. When a court acts summarily, and sets aside proceedings on evidence *dehors* the record, the ground of decision cannot be legally known to an appellate court, for no bill of exceptions is allowable in such a case: 7 Harris, 363; 9 Harris, 105. In such circumstances it cannot be known whether the judgment pronounced was sound or otherwise, judicial or arbitrary. The maxim *omnia presumuntur rite esse acta* is applicable to the judgments of

¹ *Harrisburg, Portsmouth & Mt. Joy R. R. v. Bucher*, 7 Watts, 33 (1838).

² 45 Pa. 339 (1863).

courts ; but it ordinarily applies to matters of form and order, which often are, if not always the guardian of rights as well as principles. Here there is no presumption of law sufficient in itself to sustain the court in setting aside these proceedings, and no exhibition of evidence of which we can legally take notice authorizing it. The proceedings, including the report, being regular on their face, and there being nothing legally impeaching them, it was error to set them aside. The remedy in such a case was, and perhaps is by appeal."

The names of all the tenants in common should be joined in the proceedings for assessing damages, and if they are not all joined the irregularity cannot be cured by the subsequent formal release of the tenant in common not joined in the proceeding. In a *per curiam* decision the court said: "This proceeding could be regularly instituted in the names, not only of the tenants, but also of their wives, who are tenants in common ; and it would certainly be safest to state the nature of the title. The authority given by the absent tenant extended only to the use of his name and that of his wife ; certainly not to a recovery in the name of the one for the use of both. Nothing but a conveyance to the co-tenant could authorize that. Neither could an irregularity which was fatal at first be cured by an act of subsequent confirmation ; for to allow the complainants to affirm or reverse, as the event would be favorable or otherwise, would give them an unreasonable advantage over the respondent in point of reciprocity.

Where the title to the land is in dispute notice should be served by the railroad company upon both parties claiming the land.¹

¹McCurdy v. Chestnut Hill R. R., 8 W. N. C. 143 (1879).

When a party brought an action to recover damages for an injury to real estate, and upon the trial it appeared that he had no title to the property, the court would not, under the Acts of May 4, 1852, or April 12, 1858, allow an amendment by inserting the name of the real owner in his stead, especially when it appeared that the plaintiff had no merit in his case independent of the defect in his title.¹

An answer to a petition for the appointment of a jury of view on behalf of a property-owner denying the title of the petitioner, cannot be filed *nunc pro tunc* after the report of the jury has been filed.²

On exceptions to the report of the jury, if the court find that the petitioner has no title in the land the report awarding him damages will be set aside.³

Miscellaneous Matters of Practice.

112. If the jury is sworn by the crier of the court in the absence of the judge, the report of the jury will be set aside; but if the person aggrieved by the report, makes no objection to the swearing of the jury by the crier, and subsequently objects to a re-swearing of the jury, the irregularity is waived.⁴

Where land bound by liens of judgment and mortgages is condemned by a railroad company, under Act of February 19, 1849, and it is not alleged that the property bound by the liens is sufficient for their payment, the damages awarded by the jury may be ordered to be paid into court, under the equity powers of the court, for the protection of all parties interested, upon application of the

¹ *Freeland v. Pennsylvania R. R.*, 2 Pearson, 73 (1870).

² *In re Connecting R. R.*, 1 Leg. Gaz. Rep. 22 (1870).

³ *In re Connecting R. R.*, 1 Leg. Gaz. Rep. 22 (1870).

⁴ *Roberts v. Central Pass. Ry.*, 1 Brewster, 538 (1868).

railroad company alone, without joinder of the lien creditors.¹

A conditional verdict in an action on the case may be sustained. Thus verdict for \$7,000 to be released, except \$300 thereof, on the defendants making their railroad in the middle of the street, at a specified depth, and taking up the existing railroad, is unobjectionable in form. The court will control the execution.²

When there is nothing on the record to the contrary, the court may correct the misnomer of a railroad company by substituting the word "railway" for "railroad." In *Pittsburgh, Fort Wayne & Chicago R. R. Co. v. Evans, Woodward*, C. J., said: "We see nothing upon the record to satisfy us that the 'railroad' and the 'railway' companies were different corporations, and hence we conclude the court found them to be the same corporation, and only corrected a very unimportant misnomer, and in that we see no error."³

It is the duty of the jury to file the award; and if they fail to do so, they can be compelled to file by an order of court.⁴

The same day may be fixed for views of different properties.⁵

In proceedings to assess damages it is unnecessary for the plaintiff to file a declaration.⁶

The right of trial by jury does not belong to a citizen in proceedings by the State under her powers of eminent domain.⁷

¹ *Philadelphia & Reading R. R. v. Pennsylvania Schuylkill Valley R. R.*, 151 Pa. 569 (1892).

² *Moyer v. Germantown R. R. Co.*, 3 Watts & Serg. 91 (1841).

³ 53 Pa. 250 (1866).

⁴ *Hays v. Baltimore & Ohio R. R.*, 3 Pennypacker, 52 (1882).

⁵ *Reitenbaugh v. Chester Valley R. R. Co.*, 21 Pa. 100 (1853).

⁶ *Lehigh Val R. R. Co. v. Lazarus*, 28 Pa. 203 (1857).

⁷ *Pennsylvania R. R. v. Lutheran Congregation*, 53 Pa. 445 (1866).

Viewers may be appointed upon the application of a railroad company, although an agent of the railroad had made a parol contract with the land-owner as to the amount of damages to be paid by the company.¹

Change of Venue.

113. After an appeal has been taken from the report of viewers, and the proceeding assumes the form of an action or suit against the railroad company, the case may be removed to another county under the Act of April 14, 1834.²

In *Williamsport & Elmira R. R. Co. v. Cummins*,³ it was held that under the Act of April 14, 1834, a railroad company may remove a case against them for land damages to another county at any time before the jury is sworn.

Excessive Damages.

114. The court below may set aside an award if the damages are grossly excessive.⁴ Even after a case has been reversed in the Supreme Court and a *procedendo* awarded, the court below may set aside the report of viewers on account of the excessive amount of the damages.⁵ If there is a very material difference between the amount of damages assessed by the viewers and the amount of the verdict on the appeal, the court will grant a new trial.⁶

Where an Act of Assembly chartering a railroad com-

¹ *Palethorp v. Philadelphia & Trenton R. R.*, 2 Walker, 487 (1866).

² *Pinneo v. Lackawanna & Bloomsburg R. R. Co.*, 43 Pa. 361 (1862).

³ 8 Watts, 450 (1839).

⁴ *Phila. & Erie R. R. Co. v. Cake*, 95 Pa. 139 (1880); s. c. 1 Leg. Rec. 228 (1879).

⁵ *Cake v. Phila. & Erie R. R.*, 1 Leg. Rec. 228 (1879).

⁶ *Springer v. Baltimore & Philadelphia R. R.*, 3 Delaware County, 132 (1886).

pany provides that the jury appointed to assess damages shall make a report to the court, upon which, when confirmed, judgment shall be entered, the court has the power to set aside the proceedings for excess in the estimate of damages. In *Pennsylvania R. R. Co. v. Heister*, ROGERS, J., said: "When the court conscientiously believes injustice to have been done, to refuse to interfere for no other reason than that the inquest have come to a different conclusion is, in our view, a narrow construction of the act. The legislature intended the court to be a check upon the jury, and when too much or too little, in their judgment, is awarded, justice, which is the governing rule, requires it should be ordered for a new hearing."¹

Where an act provides that the Court of Common Pleas may either affirm or set aside the verdict of the jury of view as shall be lawful and right, the Supreme Court will not set aside the verdict upon the sole ground that the Court of Common Pleas differed from the jury in estimating the amount.²

Execution.

115. Whenever a railroad company has located its road, and made an effort to agree with the land-owner, proceedings may be begun by either party for ascertaining damages. When such damages have been ascertained and judgment entered for them the right of the land-owner is completely settled, and he is entitled to execution.³

A corporation is within the act allowing a stay of exe-

¹ 8 Pa. 445 (1848). But see *Willing v. Philadelphia, Wilmington & Baltimore R. R.*, 5 Wharton, 460 (1840).

² *Phila. Wil. & Balt. R. R. Co. v. Gesner*, 20 Pa. 240 (1853); *Reitenbaugh v. Chester Valley R. R.*, 21 Pa. 100 (1853).

³ *Neal v. Pittsburgh & Connellsville R. R.*, 2 Grant, 137 (1856); *Davis v. North Pennsylvania R. R.*, 2 Phila. 146 (1856).

cution on entering security. MITCHELL, J., said: "It is certainly strange that at this date it should be an arguable question whether a corporation is entitled to stay of execution as other defendants. The existing statute was passed fifty-two years ago, and was then closely copied from its predecessor of thirty years earlier, so that the law has been substantially unchanged since 1806, yet no express adjudication upon this point has been found in our reports except one on the temporary act of 1857.

"Before passing to the consideration of the case upon principle, I must notice briefly an argument founded on an inaccurate reading of the statute. It is said that the present action being in debt, is expressly excluded by the terms of the Act of 1836. But this is an error. The language of § 3, P. L. 762, Purd. 739, pl. 4, is 'except actions of debt and *scire facias* upon judgments,' but this does not mean actions of debt generally, but debt upon judgments, and so it has always been understood. See 1 Troubat & Haly's Practice, 4th ed., p. 833, where the language is transposed to make the meaning more certain. 'By the words of the act the stay is allowed only in actions upon contracts, and actions of *scire facias* upon mortgages and of *scire facias* or debt upon judgments are expressly excepted.'

"The general purpose of the stay laws is to give time to debtors who have means to pay, but may be temporarily unable to command the requisite money. If they have unincumbered freehold of the proper value, that of itself entitles them to the stay; if they have not, then they may have the stay upon security. It is a mistake to suppose that the whole or even the chief object was to relieve the person of the debtor from a *capias ad satisfaciendum*. If that had been all, it would have been easy to enact that no *capias* should issue if the debtor has freehold, etc.,

and in fact even this provision would have been unnecessary, as a *capias* could not issue until after a failure to find goods or lands on which to levy. But the purpose of the law was much broader, and was part of the settled policy conspicuous from the earliest history of the colony to make the administration of the law as merciful as should be consistent with the ultimate attainment of justice. Hence, if the plaintiff were made secure of his demand, the debtor was afforded time to arrange his affairs to procure the money without a sacrifice of his property at the hands of the sheriff. This is clearly set forth in the Act of 1700, 'for taking lands into execution for the payment of debts,' which contains the proviso that 'the messuage and plantation upon which the defendant is chiefly seated shall not be exposed to sale before one whole year after judgment is obtained; to the intent that the defendant, or any other in his behalf, may endeavor the redemption of the same:' 1 Smith's Laws, 7. Stay laws in one form or another have been in force from that time to this.

"Another striking illustration of the same policy is the provision for inquisition and extent of lands where the rents and profits are sufficient to pay the judgment within seven years, a provision substantially unchanged since the Act of 1705: 1 Smith's Laws, 58.

"The system of stay laws is a general one, dealing with the relation of debtor and creditor, and having no special reference to the distinction between natural and artificial persons. Corporations as debtors are as much within the scope of the intent as individuals, and they are certainly not excluded in terms. Nor do I think they are necessarily excluded by the phraseology of the act. Much stress has been laid on the provision that execution may be issued at once unless security, 'in the nature of special bail,' be

given, and it is said that a corporation cannot enter special bail, as it cannot be surrendered, which is an essential of special bail. This does not seem to me entitled to the weight that has been given to it.

"In the first place, this bail is not the bail for stay of execution, but only a preliminary to afford the debtor a breathing time of thirty days in which to 'find security to be approved of by the court.' The latter is the real security for the stay, and if entered within the thirty days and before actual execution issued, would undoubtedly be good, even though no preliminary bail had been entered at all.

"But the act does not say that even for this preliminary period 'special bail' shall be given, but security in the nature of it, thus indicating that the legislative mind saw clearly that it was not technical special bail that was to be required, but security that should be equivalent to it. If this were at all doubtful it would be made clear by the Act of March 20, 1854, § 1, P. L. 189, Purd. 740, pl. 8, prescribing that bail for stay of execution shall in all cases be bail absolute for payment, etc., thus showing that the technicalities of special bail were not considered to have any bearing on the intent of the act.

"It is probably true that corporations were not specifically in the mind of the legislators at the passage of the acts. Private corporations not for charity, but for business purposes, were exceedingly few in 1806. In the same way, married women were certainly not in the legislative mind, as judgments against them on contracts were possible only in most exceptional cases, if at all. Yet, married women who might come, then or now, within the category of debtors, could not be excluded from the benefits of the act, and the same reason would cover corporations. They are within the general scope of

the act, and there is nothing to show an intent to exclude them.

"I have given this subject a longer consideration than I should otherwise have thought necessary out of deference to the opinion of PEARSON, P. J., in *Boyer v. Railroad Co.*, 1 Pearson, 113. That case, it is true, did not arise under the general law, but under the temporary Act of October 13, 1857, P. L. 1858, p. 613, passed at an extra session of the legislature to meet the financial disasters of that year. But that act was intended to be more liberal than the Act of 1836, which it temporarily superseded, and Judge PEARSON's decision must be conceded at least equal force as if made directly on the Act of 1836. Moreover, that eminent and experienced jurist, in refusing a stay, says without qualification, that 'none of the acts heretofore in force in this State give a stay of execution to corporations.'

"For reasons which I have already stated, I do not regard the grounds of the decision as conclusive, but I should hesitate to oppose my own opinion to his emphatic language above quoted, were I not convinced that his views are not those generally entertained by the profession and the courts."¹

¹ *Allison v. Philadelphia & Reading R. R.*, 5 Pa. C. C. R. 344 (1888). See *Harrisburg & Potomac R. R. v. Pepper*, 84 Pa. 295 (1877), where the court said: "That act applies to the recovery of money due by contract, or of damages arising from a breach of contract. Damages for the taking of property by a railroad company does not rest in contract express or implied. It arises by an act of appropriation under the State power of eminent domain. It is an exercise of power which the individual cannot resist, if prosecuted according to the Constitution and law of the State. The owner of the property has no voice in the taking, except to demand that his property shall not be taken without payment or security as required by the Constitution. But the entry of the company is a seizure, and an appropriation to the use of the company which needs no consent to give it efficacy, if the conditions of the Constitution and law be complied with. Nor is there any reason why the railroad company should demand a postponement of payment, when it has acquired possession by its own seizure. Payment may have to, does often wait, on the necessary proceeding to liquidate the damages; but

On an application for an appeal from an award of arbitrators, in *forma pauperis*, under the Act of June 16, 1836, the court can permit the appeal not only without the payment of costs which have accrued, but also without giving security "for the payment of all costs accrued, or that may be legally recovered in such case against the appellant," as required by the Act of March 20, 1845.¹

Appeals.

116. Under the Act of April 9, 1856, a person or corporation aggrieved by an award of viewers is not required to pay costs or enter into a recognizance for the payment thereof as a condition of a right to appeal.²

Time Within which Appeal Must be Taken.

117. Under the Act of April 9, 1856, P. L. 288, repealing the Act of April 27, 1855, P. L. 365, an appeal from an assessment of damages must be made within thirty days from the filing and not from the confirmation of the report.³

An appeal by either party from the award of viewers operates for the benefit of both parties, and after the time within which it is to be taken has expired it may not be withdrawn without consent. If, however, after such time has expired and the court has erroneously ordered the appeal to be withdrawn, the other party is not

this done, postponement of payment is in derogation of the constitutional right of a citizen, and the law should not be expounded to cover such a case beyond its liberal terms." See, also, *Boyer v. Northern Cent. Ry.*, 1 Pearson, 113 (1857).

¹ *Greenwood v. Philadelphia, Wilmington & Baltimore R. R.*, 5 Pa. C. C. R. 245 (1888).

² *Gettysburg Memorial Assn. v. Sherfy*, 117 Pa. 256 (1887). See *Perry v. Pennsylvania Schuylkill Valley R. R.*, 3 Pa. C. C. R. 59 (1887).

³ *Gwinner v. Lehigh & Del. Gap R. R.*, 55 Pa. 126 (1867). See *Perry v. Pennsylvania Schuylkill Valley R. R.*, 3 Pa. C. C. R. 59 (1887).

entitled to enter an appeal *nunc pro tunc*, but the erroneous order should be vacated.¹

Right to Appeal Relates to the Remedy.

118. Any change in the law relating to condemnation proceedings which affects merely the remedy and does not impair any franchise of the company or the obligation of a contract is valid. Thus, under the Act of March 27, 1848, no appeal lay from the assessment of damages. The Act of June 13, 1874, gave an appeal to either party. It was held that the right to appeal related merely to the remedy, and did not impair any franchise or contract of a railroad company.²

When Judgment of Lower Court is Final.

119. Prior to 1874 in proceedings against the Pennsylvania Railroad Company to assess damages for lands appropriated there was no appeal to the Supreme Court, and the judgment of the Common Pleas was final and conclusive, except for irregularities manifest upon the face of the record.³

Where exceptions have been filed by both parties to a report of viewers, and the court entered judgment upon the award, the judgment is a final adjudication of the controversy until set aside by the court, or reversed by the Supreme Court.⁴ But an order of court approving a bond to secure land damages is interlocutory, and is not the subject of an appeal.⁵ There is no appeal to the Supreme Court from the decision of the Common Pleas on

¹ Schuylkill River East Side R. R. v. Harris, 124 Pa. 215 (1889); Morgan v. Lockwanna & Bloomsburg R. R., 5 Kulp, 323 (1889).

² Long's Ap., 87 Pa. 114 (1878).

³ Heise v. Pennsylvania R. R., 62 Pa. 67 (1869).

⁴ Pennsylvania R. R. Co. v. Gorsuch, 84 Pa. 411 (1877).

⁵ Slocum's Ap., 12 W. N. C. 84 (1882).

an exception to the report of viewers relating to an improper interference of a party with the jury of view.¹

The remedy of a railroad company for an award of excessive damages is by appeal, and not by exceptions.²

¹ North Penn. R. R. Co. v. Davis, 26 Pa. 238 (1856).

² Roberts v. Central Pass. Ry., 1 Brewster, 538 (1868); Philadelphia, Germantown & Norristown R. R. v. Smick, 2 Wharton, 272 (1837).

The following rule as to appeals was adopted in Allegheny County:

And now, January 7, 1860, it is ordered by the court, that on all appeals in damage cases for lands or materials taken for railroads, turnpikes, plank roads, or lateral railroads, an issue shall be made and formed as follows, viz.:

SECTION 1. The owner of the land or materials shall be made the plaintiff.

SEC. 2. The plaintiff shall file a statement of claim as nearly as the exigencies of the case will admit of in the following form:

Statement of claim.—The said complains that said have (or has) located their road upon, and are about to enter into and occupy, for the purpose of making said road, a certain piece (or pieces) of land, of which he, the plaintiff, is seised in fee (or such other interest or estate as he has therein), and which said piece of land is situate and described as follows (plaintiff may describe and define the land for himself, if he thinks the diagram filed with the petition or award incorrect, or he may describe it by reference merely to such diagram and description thereof made by defendant); and that such piece of land, with the improvements and appurtenances, so taken as aforesaid, is of great value, to wit, of the value of \$; and by reason of such taking and appropriation thereof, and the manner of the separation thereof from his the said plaintiff's other lands, and by reason that the disadvantages resulting to him from said road, so to be made and used, greatly exceed the advantages by him to be derived therefrom, he has and will sustain great injury, and will suffer damage to the amount of \$, and which amount of damages ought of right to be paid to him, but payment thereof is refused by the said , and therefore he brings suit. (This form may be varied to suit the facts of the particular case.)

SEC. 3. Such statement of claim being filed, the plaintiff may serve a copy thereof on the defendant, which shall be taken and regarded in all respects as a rule to plead, on five days' notice; and the defendant thereupon shall plead or demur, or file such counter statement as will join issue on one or more material allegations or averments of the plaintiff, or plead in confession and avoidance thereof; and such allegation or averment as is not so traversed or avoided, will be taken on the trial as confessed; and the defendant, in like manner, after the appeal is entered, may have rule on the plaintiff, as of course to file his statement of claim, on five days' notice; and either party in default, after service of copy of statement or rule aforesaid, may be taken as waiving the right to a trial by jury and the court, on motion, may make such further order as will procure an issue to be joined, or enter such final judgment against the party so in default as to justice may belong: Pittsburgh & Connellsville R. R. v. Watson, 2 Pittsburgh Rep. 82 (1860).

Withdrawal of Appeal.

120. Where a landlord appeals from the award, but afterward withdraws his appeal, he has no just cause of complaint that the court entered judgment in the award as of the date of the withdrawal of the appeal.¹

Appeal by Heir.

121. The heir or devisees of a land-owner have the right to appeal in the name of the administrator from an assessment of damages, although a bond was given to the decedent by the railroad company.²

Statute of Limitations.

122. The limitation Act of March 27, 1713, does not apply to proceedings to assess damages for land taken by a railroad company.³ This is the case although a bond has

¹ *Donaldson v. Pennsylvania R. R.*, 5 Pa. C. C. R. 62 (1884).

² *McCay v. Baltimore & Philadelphia R. R.*, 2 Chester County, 558 (1885).

³ *Del., Lack. & West. R. R. v. Burson*, 61 Pa. 369 (1869); *Foster v. Cumberland Valley R. R.*, 33 Pa. 372 (1854) questioned.

In *McClinton v. Pittsburgh, Fort Wayne & Chicago Ry. Co.*, 66 Pa. 404 (1870), AGNEW, J., explained Delaware, etc., Railroad Co. v. Burson, 61 Pa. 369, as follows: "The proceeding there was upon a petition for damages. The entry of the company was in 1853 and the road was not completed until 1856, while the proceeding was instituted in 1861, less than six years after the completion of the road, and it recited and adopted the original entry of the company in 1853. Besides, the entry had been made under the written release of Deborah Burson, but who being a married woman, and her husband not joining in the writing, though consenting thereto, was seeking by this means a greater compensation than the one dollar stated in the writing. The statute of limitations was pleaded as a bar to the entire proceeding by petition, and not merely to cut off the antecedent damages, the company was choosing to make any point as to them. The question arose upon the following point: 'Under the evidence in this case the plaintiff's entire cause of action accrued and the statute began to run more than six years before the commencement of these proceedings; that before that time the road had been surveyed and located, the right of the plaintiff to sue for damages was complete, and she cannot recover in this proceeding, because more than six years have elapsed from the location of the road and from the death of her husband, James Burson.' This court held on this point that the special statutory proceeding for damages was not within the general statute of limita-

been given and the corporation has taken possession of the land more than six years prior to the beginning of the suit.¹ The railroad's title by adverse possession only becomes good after twenty-one years, as provided by the Act of 1785.²

Proceedings to assess railroad damages under a special act prior to the general railroad Act of 1849, are not affected by the limitation of two years, applicable to penalties incurred under that act.³

The Act of April 17, 1866, P. L. 106, limiting the time within which actions shall be brought against railroad companies for damages for right of way, or the use and occupancy of land, is abrogated by section 21, art. III, of the Constitution of 1874. The right of action against a railroad company for damages for injuries for land taken, injured, or destroyed in the construction of its corporate works, is not affected by the six years statute of limitations of March 27, 1713, 1 Sm. L. 76.⁴

tions. Then the plaintiff was willing to waive the trespass and claim her damages under the statutory proceeding, while the defendants, nothing loth to accept this mode of ending the controversy, made no question upon her right to recover damages for the trespass in the statutory mode. Hence, the question of limitation arose wholly upon the proceeding under the statute, and for that reason it was held that the general limitation Act of 1713 was no bar. But in the present case the plaintiff, though reciting the entry of the railroad company in 1851, did not rest his right of recovery on that ground, but, by his ejectment, contested the lawfulness of the entry by the company, and still insists on his title to the land itself. The two cases are, therefore, widely different, and the recovery in the ejectment will turn the right of the plaintiff to recover his damages for the unlawful entry and possession into a common-law form of action."

¹ *Keller v. Harrisburg & Potomac R. R.*, 151 Pa. 67 (1892).

² *McClinton v. Pitts, Ft. Wayne & Chicago Ry.*, 66 Pa. 401 (1870).

³ *Del., Lack. & West. R. R. v. Burson*, 61 Pa. 369 (1869).

⁴ *Seipel v. Baltimore & Cumberland Valley R. R.*, 129 Pa. 425 (1889).

CHAPTER IX.

DAMAGES IN CONDEMNATION PROCEEDINGS—EVIDENCE.

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General Rule.

123. The measure of damages to an owner for the location of a railroad through his land, is the difference between the market value of the property as a whole before

the opening of the road and the value as affected by the road.¹ The test is, whether the land would sell in the market for as much after the construction of the railroad as before; if it would, the owner is not entitled to damages; if it would sell in the market for less, after than before, the owner is entitled to recover the difference.²

The market value of land is not necessarily the price which it would command in a forced sale by public auction; it is estimated upon a fair consideration of the location of the land, the extent and condition of its improvements, its quantity and productive qualities, and the uses to which it may reasonably be applied, taken with the general selling price of lands in the neighborhood at the time. The price which, upon full consideration of the matters stated, the judgment of well-informed and reasonable men will approve may be regarded as the market value.³

The advantages to be considered are such only as are special and actual to the property which is claimed by the land-owner to have been injured, and, in comparing the

¹ East Brandywine & Waynesburg R. R. v. Ranck, 78 Pa. 454 (1875); Shenango & Allegheny R. R. v. Braham, 79 Pa. 447 (1876); Danville, Hazleton & Wilkes-Barre Railroad Co. v. Gearhart, 32 P. F. Smith, 260 (1875); New Castle & Franklin R. R. v. McChesney, 85 Pa. 522 (1877); Pittsburgh, Virginia & Charleston Ry. v. Bently, 88 Pa. 178 (1878); Pittsburgh, Bradford & Buffalo Ry. v. McCloskey, 110 Pa. 436 (1885); Setzler v. Pennsylvania Schuylkill Valley R. R., 112 Pa. 56 (1886); Pittsburgh & Lake Erie R. R. v. Robinson, 95 Pa. 426 (1880); Pennsylvania & New York R. R. and Canal Co. v. Bunnell, 81 Pa. 414 (1876); Harris v. Schuylkill River & East Side R. R., 141 Pa. 242 (1891); East Pennsylvania R. R. Co. v. Hottenstine, 47 Pa. 28 (1864); Harvey v. Lackawanna & Bloomsburg R. R. Co., 47 Pa. 428 (1864); Hornstein v. Atlantic & Great Western Railway Company, 51 Pa. 87 (1865); Danville, Hazleton & Wilkes-Barre R. R. v. Gearhart, 1 W. N. C. 237 (1875); Danville, Hazleton & Wilkes-Barre R. R. v. McKelvey, 1 W. N. C. 338 (1875); McTerren v. Mont Alto R. R., 2 W. N. C. 40 (1875); Watson v. Pittsburgh & Connelsville R. R. Co., 37 Pa. 469 (1860).

² Long v. Harrisburgh & Potomac R. R., 126 Pa. 143 (1889); Reading & Potomac R. R. v. Baltsaer, 126 Pa. 1 (1889).

³ Pittsburgh, Virginia & Charleston Ry. v. Vance, 115 Pa. 325 (1887).

advantages and disadvantages, the general appreciation of the property in the neighborhood, consequent upon the construction of the railroad, is to be disregarded.¹

Where a road is located in one year and completed several years afterward the measure of damages is the difference between the market value of the property in the year in which the railroad was located and the market value in the year when the railroad was completed.²

Plaintiff was the owner of a tract of land in Mahoning Township, Lawrence County, through which formerly passed the Ohio & Pennsylvania Canal, a small portion of his land lying between the canal and the Mahoning River. In 1873, the canal was abandoned, and in November, 1877, the Pittsburgh & Lake Erie Railroad Co., claiming to own the land occupied by the canal, entered and began the construction of their road, which was completed in the fall of 1878. About the year 1882, the Pittsburgh, Cleveland & Toledo Railroad Co. purchased of the plaintiff, in fee, for railroad purposes, a strip of land sixty feet in width, adjoining the land occupied by the defendant and extending across the entire tract, and built their railroad thereon. The plaintiff subsequently brought an ejectment against the Pittsburgh & Lake Erie Railroad Co., the defendant, to settle the title to the strip occupied by their road, formerly covered by the canal, and recovered a judgment. The company subsequently filed a bond and appropriated a right of way under the right of eminent domain. It was held that in assessing damages for such an appropriation, they were to be computed as the date upon filing the bond. The measure of damages would be computed upon the value of the land unaffected by the obstruction of the plain-

¹ Long v. Harrisburg & Potomac R. R., 126 Pa. 143 (1889).

² Del., Lack. & West. R. R. v. Burson, 61 Pa. 369 (1869).

tiff's road, and its value as affected by it. The landowner would have an action of trespass for recovery of the damages, which he had experienced in the past, while the assessment under the statute would be for the price of the permanent right or privilege to be enjoyed in the future; but that price would be settled by a consideration of the value of the land at the time of its lawful appropriation, in the condition in which it was before the railroad was constructed, and its value afterward. CLARK, J., said: "Although the damages are to be computed as of the date of the divestiture of the plaintiff's title to the right of way, yet it is plain that the land must be valued, in the first instance, free from the obstructions of the plaintiff's road, and in the condition in which the defendant company found it upon their first entry: *Justice v. Railroad Co.*, 87 Pa. 28. As, at the time of the filing of the bond, the plaintiff had established his right to the property free from the obstruction of the railroad, he has a right to have the assessment made of the land in that state. The sale to the Pittsburgh, Cleveland & Toledo Railroad Co. was, of course, made under stress of the conditions affecting the land at the time, and may have been for a much less consideration than would otherwise have been available: *non constat*, that but for the appropriation of the defendant's right of way the sale of the adjacent strip would ever have been made; for although the first appropriation was wrongful, it was of a manifestly permanent nature, and was capable of being perfected under the statute. In estimating the injury done to the plaintiff in the taking of his land for right of way, the value of the land, unaffected by the construction of the railroad, is necessarily referable to some previous condition, for the railroad, at the time of the filing of the bond, was in full operation: we must go back to the time of the original entry, to as-

certain the condition of the land, upon which the value is to be computed as of the date of the actual and lawful appropriation. What was the condition of the land when the railroad company first entered for the construction of the railroad? What was its value in that condition on December 3, 1890, unaffected by the railroad, and what its value as affected by the railroad? The difference would be the proper measure of damages.

"There is a class of cases in which the company has been held to have acquired such an equity as entitled it to a conditional verdict or decree and an assessment of damages made in execution of the company's right. In *Wheeling, etc., R. R. Co. v. Worrall*, 122 Pa. 613, the parties submitted the assessment of damages to certain persons named, who made an award, and although the amount awarded had never been paid, yet this court held that 'by the award and the agreement on which it was founded' the company 'exhibited an equity which properly reduced the judgment to a conditional one, and thus relieved the defendant from a total loss of its improvements.' So, in *Allegheny V. R. R. Co. v. Colwell*, 2 Mona. 300, decided at the October term, 1888, and not officially reported, it was said: 'But, as Colwell was at least passively derelict in knowingly permitting the railroad company to occupy and put its improvements on his land, we agree that it would be inequitable to allow the judgment to work a forfeiture of those improvements,' and execution was accordingly stayed to enable the company to proceed under the statutes. In *Oliver v. Railway Co.*, 131 Pa. 408, where the entry was under a lease from the life-tenant, and with the knowledge and acquiescence of the guardian of the person entitled in remainder, who saw the expenditures made in the construction of the road, it was held that the entry so made could not be

treated as a trespass. 'In all the cases, however, in which the entry was made with the knowledge and consent of the owner,' says our Brother WILLIAMS in that case, 'the action has been treated as equitable in character. The corporation, having been permitted to enter in advance of the ascertainment of damages, did not thereby lose its right to proceed in the usual manner to secure their adjustment through the courts, and the action of ejectment has been sustained as a means of quickening the action of the corporation in this regard. While the owner has not parted with his title by his own conveyance, or had it divested by proceedings under the statute, he has parted with the possession under circumstances, and permitted expenditures upon and use of the property of such a character as to make it inequitable for him to resume the possession or to defeat the right of the corporation to proceed under the statute, and add to its lawful possession a lawful title by virtue of a compliance with its provisions.'

"In all cases, as we have cited, the assessment covers the entire damages with like effect as if the bond was filed at the time of the original entry. The title of the railroad company, in such a case, comes, not through the proceedings to assess the damages, but through its original entry and appropriation of the right of way, with the consent or without the objection of the owner: Lawrence's AP., 78 Pa. 365. But in the case now under consideration the defendant entered, at the outset, under a contested claim to the land in fee. The plaintiff brought an ejectment, and the title was held to be in him. The company was found to be a trespasser, and was answerable as a trespasser, to the extent already stated. There was no equity exhibited, nor was any invoked, which would have justified a conditional judgment. The damages for the right

of way are therefore to be estimated according to the general rule established in such cases."¹

If the parties in condemnation proceedings submit to arbitrators "the entire question of damages to the premises of the plaintiff, actual or constructive, present or future," the arbitrators can only consider such damages as the plaintiff may sustain under the present law by the exercise of the right of eminent domain.²

Separate Tracts.

124. Two distinct lots of land connected only by means of a way, cannot be treated as one tract in the assessment of damages. Plaintiff owned a lot abutting on a public street occupied by the tracks of a railroad. He also owned a larger tract, separated from the first by the land of another owner, but connected with it by a private way, twelve feet wide over the intervening tract. It was held that the plaintiff was not entitled to recover damages for injuries to the second tract.³

Plaintiff was the owner of a farm containing forty-six acres, which was used and controlled by him. Part of it was let to others to cultivate and part was cultivated by the plaintiff and his employees. It was not divided by any natural or artificial boundaries that were visible on the ground; but a surveyor's line had been run across it and its position indicated upon a draft that was placed before the jury by a dotted line. The surveyor testified

¹ *Graham v. Pittsburgh & Lake Erie R. R.*, 145 Pa. 504 (1891).

² *Miller v. Railroad Co.*, 2 C. P. Rep. 11 (1885).

³ *Pennsylvania Co., etc., v. Pennsylvania Schuylkill Valley R. R.*, 151 Pa. 334 (1892). An independent and separate tract of land not touched by the railroad, and constituting no part of the tract which the railroad passes upon, has the same separateness in the hands of the same person as it has in the hands of different owners. The law has regard to the land out of which the property is taken considered as a whole, and not to the person of the owner: *Harrisburg & Potomac R. R. v. Moore*, 4 W. N. C. 532 (1877).

that when the line was run by him there was no fence, no hedge-row, no monuments of any sort on the ground to indicate its location. The plaintiff testified that at one time there had been a hedge-row or brush on or near the line run by the surveyor, but that he had cleared it away. The part of the farm lying between the surveyor's line and the Springfield road contained about thirteen acres, and had been used for some years as a "truck patch." It was contended on the trial that this part of the farm should be treated as a distinct and separate property, and left wholly out of the view in the assessment of the plaintiff's damages. Whatever advantages accrued to this part of the farm the plaintiff contended belonged to him, and whatever disadvantages were suffered as to the balance of his farm thus divided he claimed a right to recover for. In this way he cut off all the balance of his farm from the Springfield road, by the surveyor's line, and asked to be paid for the inconvenience thus created. WILLIAMS, J., said: "The general principles applicable to this case have been declared by this court with such frequency and clearness as to make a discussion of them at this time unnecessary. They are these:

"1st. The proper measure of the injury sustained by a land-owner by reason of an entry upon and appropriation of any portion of his land is the difference between the market or selling value of his land before and after such an appropriation.

"2d. In determining this difference in market or selling value the advantages and disadvantages resulting from the appropriation are to be taken into consideration.

"3d. The advantages and disadvantages are to be estimated upon the farm or tract as a whole and not upon each separate field as though it was a separate property.

"4th. An advantage accruing to one farm or tract by

reason of the construction of the railroad near or through it cannot be set off against an injury sustained by another piece of property belonging to the same owner.

"5th. Nor can the owner of a farm or tract, part of which is benefited and another part of which is injured, divide his property arbitrarily so as to exclude from the consideration of the jury the advantages he secures in one place while recovering for the disadvantages suffered in another.

"These well-settled rules applied to the facts disclosed in this case show that the contention of the plaintiff cannot be sustained. It was error to submit to the jury the question whether 'the whole tract of forty-six acres has been divided into different farms, separated by fixed lines, not a mere temporary division but actually settled and reasonably permanent one,' for there was no evidence on which such a finding could rest."¹

Plaintiff owned land which was taken by the defendant. He also owned a large hotel in Reading which was not upon the land condemned. The defendant attempted to show as an offset to the damages claimed that the value of the hotel had been greatly increased by the building of the railroad. The court refused the offer. On a writ of error the ruling was sustained, KENNEDY, J., saying: "By the terms of the act incorporating the company it is only the advantages resulting to the complainant from the road being made through the same land in which he alleges he has been injured by means of it that can be taken into consideration in estimating the amount of damages sustained by him, if any."²

A railroad was laid along an unopened street dividing plaintiff's land into two pieces, one north of the street

¹ Baltimore & Philadelphia R. R. v. Springer, 21 W. N. C. 143 (1888).

² Philadelphia & Reading R. R. v. Gilson, 8 Watts, 243 (1839).

containing a little over thirteen acres and the other south containing about eighteen acres. The witness valued the two pieces at \$15,000 per acre. He was then asked to describe the effect of building the road upon these two pieces, which, being objected to on the ground that the witness must testify as to the effect upon the whole property, the objection was overruled, it being stated by counsel that the question would be followed by asking the witness as to his judgment of the effect upon the entire property. Exception was taken by the defendant and the witness then testified that the effect was to depreciate the whole of the property immediately north and south of Oregon Avenue, containing together thirty-one and eight-tenth acres, twenty per cent. of its value, which, with the ground taken, amounted to \$40,270. He next answered that he thought the railroad would not affect the value of the part below Moyamensing Avenue one way or the other. It was held that the examination of the witness was improper.¹

Where an eight-acre lot is taken, and both parties introduce evidence as to the value of a distinct tract of sixteen acres, owned by the plaintiff, and untouched and unaffected by the railroad, such testimony, if neither party except to it, nor move to strike it out, may be submitted to the jury as bearing upon the value of the eight-acre lot.²

Evidence that land about a half a mile away from the land condemned and nearer to the built-up portion of a city, was being built upon, and that building operations were still in progress, is inadmissible to show the value of the land taken for future building purposes.³

¹ *Schuylkill River & Eastside R. R. v. Stocker*, 128 Pa. 233 (1889).

² *Sloan v. Baltimore & Philadelphia R. R.*, 131 Pa. 568 (1890).

³ *Schuylkill River & Eastside R. R. v. Stocker*, 128 Pa. 233 (1889).

In order that two properties, having no physical connection, may be regarded as one, in the assessment of damages for right of way, they must be so inseparably connected in the use to which they are applied, as that the injury or destruction of one must necessarily and permanently injure the other.

Plaintiffs, E. Channing Potts & Brothers, were in the year 1883 engaged in the business of quarrying, sawing, and selling marble, etc. Their quarry was located on a tract of land in the township of Whitemarsh, Montgomery County, consisting of about one hundred acres. The product of the quarry was transported in wagons to a siding of the Philadelphia & Reading Railroad, at Spring Mill, a mile or more distant from the quarry, where they had a lot of land of about four acres, which they used for storage and for loading and shipping on the Philadelphia & Reading Railroad to their sales yard or depot and business place, at Ninth and Thompson Streets, in the city of Philadelphia. The Spring Mill lot and the yard at Ninth and Thompson Streets were the individual property of E. Channing Potts. The quarry was owned by E. Channing Potts and W. W. Potts, as tenants in common; while E. Channing Potts & Brother were in the possession and enjoyment of all these several properties, to wit: the quarry, the shipping lot, and the marble yard, as lessee from year to year and co-partners, conducting the general business of preparing, transporting, and selling the products of the quarry. The Pennsylvania, Schuylkill Valley Railroad Co. located their road on the Spring Mill lot, appropriating one-half acre, more or less, of the land; their road ran parallel with the Philadelphia & Reading Railroad, between that road and the quarry, the grade line of the former being about two and a half feet above that of the latter, cutting off the switch and siding

connections which the plaintiffs had with the Philadelphia & Reading Railroad. Plaintiffs' contention was that their partnership business had thereby been broken up and ruined, that the market value, not only of the Spring Mill lot, but of the quarry and the marble lot had been greatly impaired and depreciated in the hands of the lessees, and also of the respective owners thereof; that the three properties, although not contiguous, were used as one; that the destruction of the siding and shipping facilities at Spring Mill was an injury to the quarry and also to the sales yard, and that damages, both direct and consequential, must be awarded to the several plaintiffs in the proceeding, according to their respective injuries and interests. The court held that the recovery of damages must be confined to the injuries to the property which was actually taken. CLARK, J., said: "No case has been called to our attention which rules, explicitly and arbitrarily, that several pieces of real property, not contiguous, cannot for that reason, under any circumstances, be considered as one property. The general rule, however, undoubtedly is, that disconnected properties are to be treated as distinct, and damages for right of way will ordinarily be assessed on this principle. Where a person resides upon one of a number of contiguous town lots, but uses all of them together as a homestead, as if the whole constituted but a single inclosure, and a railroad company appropriates a portion of one only of the lots, the damages will doubtless be assessed for the injury done to the whole property. So, if one buy a farm in separate contiguous portions from different persons, but occupy the whole in a body for farm purposes, as one farm, the damages for the appropriation of a part, or even the whole of one of the original pieces will be assessed upon the injury done to the whole tract. Peculiar and isolated cases

may perhaps exist, also, where although the lands are not in fact contiguous, yet the uses to which they are applied, respectively, are in their nature so intimate and dependent, one upon the other, that an injury to one must necessarily be taken as an injury to the whole taken together; for example, the land upon which a water-mill is erected will ordinarily draw to it as an appurtenance, or rather will be regarded as embracing the ground covered by the reservoir, so that the latter will be regarded as a part and parcel of the former, although they are not contiguous.

"But we do not regard this case as coming within the general exception stated. The quarry was a distinct and disconnected property from the Spring Mill lot, it was devoted to a wholly different purpose, and the same may be said of the sales yard at Ninth and Thompson Streets. The first was a quarry used for quarry purposes alone, and the product was delivered at Spring Mill over the public wagon road; the second was a shipping point having no connection with the quarry, by contact of the lines, by railway, or any other private means of transportation, and the yard at Ninth and Thompson Streets was a sales yard accessible by the Philadelphia & Reading Railroad, thus they were each disconnected from the others, and each was used for a distinct and separate purpose. They were not only different properties, applied to different uses, but the fee was held and owned by different persons, neither of them could be considered as appurtenant to, or part and parcel of the other. There was no special reason, outside of the convenience and appliances existing at Spring Mill, why the marble should be shipped from that point, and for these appliances the plaintiffs were entitled to be paid."¹

¹ *Potts v. Pennsylvania Schuylkill Valley R. R.*, 119 Pa. 273 (1888).

Tenants.

125. A tenant may institute proceedings to recover damages against a railroad company for the taking of leasehold premises. It is not necessary that the tenancy should be under a written instrument. All that is necessary to show is that the tenants were in possession from year to year at a certain annual rent. In such a case the jury must ascertain the aggregate amount of damages, but they may also designate the portion to which each of the parties in interest is entitled.¹

If the location of a railroad so affects the property leased from year to year as to compel the removal of the business conducted by the tenant to another place the measure of the tenant's damages is the difference between the value of the machinery in connection with the business conducted on the property and its value to be removed and applied to the same or other use. If the removal is the necessary consequence of the location of the road, it is proper for the jury to consider the probable and reasonable expense of moving the machinery.²

Plaintiffs had a contract to remove daily from a city gas works a large quantity of tar. They leased the premises, injured by railroad, from the city. The land was so situated that they received the tar without cost and manufactured it without transporting it to and from distant points. It was held that evidence was admissible to show that after the land was taken, it became necessary to carry the tar to a place of distillation by a boat specially constructed; that it was necessary to erect temporary works for the distillation of the tar when received; and that it was also necessary to haul over inac-

¹ *Getz v. Philadelphia & Reading R. R.*, 105 Pa. 547 (1884); *North Penn R. R. v. Davis*, 26 Pa. 238 (1856).

² *Philadelphia & Reading R. R. v. Getz*, 113 Pa. 214 (1886).

cessible roads the barrels needed to hold the tar and its products.¹

Plaintiff was the lessee of a wharf property under a lease, by the terms of which he was precluded from using the property otherwise than as a coal-yard, and from assigning and sub-letting it without the lessor's consent. The lease had eighteen months to run. The defendant company entered and located its road upon the demised premises, appropriating for that purpose a strip of land sixty feet in width, and dividing the property into two parts. The sheds, runs, and other appliances, were partially destroyed by this action of the company, and the construction of new ones adapted to the changed condition, became necessary in order to continue the business. A bridge, with a single span of sixty-eight feet above the railroad tracks, and a derrick, sheds, and runs of corresponding height, were required. McCOLLUM, J., said: "It is well-settled that the proper measure of damages is the depreciation in the market value of the property caused by the location and construction of the railroad. But the elements to be considered in the ascertainment of this depreciation are as varied as the properties affected, and the uses to which they are applied. A specification of all these elements is impossible, because they cannot be anticipated, and many of them remain to be developed in the course of the litigation consequent upon the taking of property by eminent domain. In the ordinary case of appropriation of land for railroad purposes, the opinions of witnesses who are conversant with the property, and the general selling price of land in the vicinity are received on the question of its value unaffected by the road, and its value as affected by it. But this is not exclusive of other, and in

¹ *Ehret v. Schuylkill River East Side R. R.*, 151 Pa. 158 (1892).

some cases better, methods of proof. It may be stated as a general principle, applicable to cases of this sort, that whatever injuriously affects the property, as the direct and necessary result of the location of the road upon it, may be considered in the assessment of damages. In this case, the estate of the plaintiff was limited to a particular use. Its enjoyment, in accordance with the terms of its creation, required that the appliances which had been rendered useless by the entry of the defendant company should be reconstructed at an elevation which increased the cost of raising and storing the coal, and increased the breakage and waste in handling it. We think these matters were properly received in evidence as descriptive of the injury inflicted, and the burden imposed on the property by the occupation of it for railroad purposes, and that they were for the consideration of the jury, not as specific items of claim, but as affecting market value."¹

After a railroad was constructed a tenant surrendered his lease, and no longer cultivated the land. In such a case the measure of damage was the difference between what the leasehold was worth immediately before the projection of the road, and what it was worth after the road had been projected and constructed.²

A lessee secured a verbal promise from his landlord to renew the lease, and subsequently a railroad company instituted proceedings to condemn the land. Afterward the landlord executed the renewed lease. It was held that the lessee was entitled to recover damages for injuries resulting both to the new term and for the unexpired portion of the old term.³

When rent is deducted from the lessor's damages from

¹ *Kersey v. Schnylkill River East Side R. R.*, 133 Pa. 234 (1890).

² *Taylor v. Baltimore & Philadelphia R. R.* 3 Delaware County, 545 (1888).

³ *Pittsburgh Junction R. R. Co. v. McCutcheon*, 18 W. N. C. 527 (1886).

the time the lease has to run, and has been awarded to the lessee, in equity it belongs to the lessor. The viewers ought to award this fund to the land-owner and not to the tenant, since the tenant has been thereby released from his personal obligation to pay rent.¹

In condemnation proceedings, it is no objection that the owner of a leasehold condemned, has joined his partners with him as parties plaintiff. Objection that parties are improperly joined should be made when the petition for the appointment of viewers is presented, or, at the very latest, when the issue is framed by the court.²

In an action of trespass by a tenant to recover damages for an entry by a railroad company which had not filed a bond, it is no defense that the company after the wrongful entry entered security in the mode authorized by the statute.³

In an action of trespass by a tenant to recover damages for an entry made prior to the filing of a bond, the court may instruct the jury that the plaintiff must be limited to such damages as had accrued between the entry and the filing of the bond, and that all damages subsequent to the filing of the bond must be recovered in the condemnation proceedings. In a case where such instructions were given to the jury, it appeared that the bond had been filed about six months after the entry. The plaintiff, however, sent out a statement with the jury containing an item for damages for being deprived of his lease for two years from the date of the entry. The statement was not examined by the trial judge. On writ of error it was held, that the judgment should be reversed.⁴

Where a railroad company enters upon land, and

¹ *Fitzpatrick v. Pennsylvania R. R.*, 10 Phila. 141 (1874).

² *Ehret v. Schuylkill River East Side R. R.*, 151 Pa. 158 (1892).

³ *Pennsylvania R. R. v. Eby*, 107 Pa. 166 (1884).

⁴ *Pennsylvania R. R. v. Eby*, 107 Pa. 166 (1884).

locates and constructs its road, without objection by the land-owner, this is an appropriation of the land, and vests the right to damages, in the owner of the land, though he lease it to another before a bond, as security for damages is filed. In such a case the lessee has no right to damages from the railroad company.¹

A railroad company constructed its road without agreement as to damages and without any legal proceedings, but also without objection by the owner. Subsequently proceedings to assess damages were commenced, but the case was compromised and the damages released. After the construction of the road, but before the compromise, the tract was leased for mining purposes. The court said: "The railroad company had actually appropriated the land and built and used its railway long before any title by lease of the coal-mines had vested in the defendants. This is admitted in the answer. The owner of the land made no objection to this appropriation, but after a proceeding to assess the damages had been prosecuted, finally compromised and released. The title of the railroad company came not through this proceeding, but by its original entry and appropriation without objection. The release operated not by way of an original conveyance, but by way of a discharge for the damages incurred by the entry and construction of the railway. It is clear, therefore, that when the defendants obtained their lease they took it subject to the previous easement and right of way of the railroad company over the surface. The railroad was then in lawful existence and use. The owner made no defense to the right of the railroad company to appropriate the land, and these tenants cannot now set up a defense which they waived, if they had any."²

¹ Davis v. Titusville & Oil City Ry., 114 Pa. 308 (1886).

² Lawrence's Ap., 78 Pa. 365 (1875).

The rental value is not *prima facie* for value of the term.¹

Life-Tenants.

126. A tenant for life may institute proceedings alone and without joining the remaindermen to recover damages for injuries caused by the construction of the railroad through the land in which he has a life estate.

In *Phila. & Reading R. R. Co. v. Boyer*,² COULTER, J., said: "The widow and those entitled in remainder for life might have joined in a proceeding and then the whole damages to the entire fee could have been assessed. I will not say, because it is unnecessary and not involved in this case, whether the amount of compensation due to the life-tenant and the amount due the remaindermen ought in such case to be assessed separately, or whether the whole ought to be assessed together, leaving the division to the parties entitled according to their respective interests.

"But although they may join, where there are several interests, either in common and in present existence or some of them in future and expectancy, yet it follows not that they must. Because one might be balked by the obstinacy of the others, or by their being bought off, or by their releasing, or because they didn't choose to proceed. It is of no force to allege that the defendants committing the damages may thereby be put to more expense by several proceedings; those who inflict injury ought not to be solely regarded; those who suffer by the invasion of their private property are entitled to more consideration in the adjustment of the remedy to their condition and circumstances; all parties are to be con-

¹*Taylor v. Baltimore & Philadelphia R. R.*, 3 Delaware County, 545 (1886).

²13 Pa. 496 (1850).

sidered and the remedy applied so as to do justice to all. We think the objection to the proceeding by the life-tenant for the damages done to her interest alone fails; she was entitled to the remedy. If there was any substance in the objection, it ought to have been taken at an earlier period of the proceedings. It being a general rule that in all actions not of contract, and proceeding on the ground of *ex delicto*, and one who ought to be named is omitted, it can only be taken advantage of by plea in abatement; otherwise, the damages will be apportioned on the trial. The damages here were apportioned, the widow claiming only for the damages done to her interest, and being assessed only to that extent. *Railroad v. Bucher*, 7 Watts, 43, was cited by the plaintiff in error, it only determines that one tenant in common could not recover in his own name entire and full damages which were assessed. The inference from the case is irresistible, that he could have recovered in his own name for his own share of the damages; the whole of that case sustains this proceeding, instead of impairing it."

In condemnation proceedings it is proper for the court to lay down a rule as to the valuation of a life estate as an independent interest entitled to damages. The net annual value of the premises multiplied by the years of the life-tenant's expectancy of life, and reduced by calculation to a present cash value, is a proper mode of determining the value of the life estate as compared with the value of the remainder in fee. The life-tenant is entitled to the proportion of the whole damages which the value of the life estate bears to the whole damages assessed.¹

Purchase at Sheriff's Sale.

127. Where land is sold at a sheriff's sale, and before

¹ *Pittsburgh, Virginia & Charleston R. R. v. Bentley*, 88 Pa. 178 (1878).

the sheriff's deed is delivered, it is taken by a railroad, the purchaser at the sale has a title sufficient to authorize him to institute proceedings against the company for damages in his own name.¹

Owner of Right of Way.

128. The owner of a right of way has a right to a jury of view to assess damages for the obstruction of his way. In this respect he differs from the owner of a ground-rent who is not affected by the taking of the land. Although both rights are incorporeal hereditaments, they are essentially different in the fact that the way has a usable, palpable connection with the land which may be actually obstructed, while the ground-rent is a mere charge on the land.²

Lessee of Coal-Mine.

129. The lessee of a coal-mine is an owner of land within the meaning of the act, and is entitled to have the damages assessed by viewers.³ But if such a lessee acquires his interest in the coal with the knowledge of the possession and use of the land by the railroad company, he cannot compel the company by a mandatory injunction to remove its tracks. His only remedy, if he has any, must be under the statute for damages.⁴

Two partners held a lease of coal lands. A railroad company located its road on the leased property. The first partner sold to the second his interest in the colliery, and all property real and personal therewith connected,

¹ Penn. Schuyl. Valley R. R. v. Cleary, 125 Pa. 442 (1889).

² Phila., Wilmington & Balt. R. R. v. Williams, 54 Pa. 103 (1867). Cf. Workman v. Midlin, 30 Pa. 372; Voegtley v. Pitts., Ft. Wayne, etc., R. R., 2 Grant, 244. See Railroad v. Jones, 50 Pa. 417; Kemp v. Pennsylvania R. R., 156 Pa.

³ Mine Hill & Schuylkill Haven v. Zerbe, 2 Walker, 409 (1853).

⁴ Philadelphia & Reading R. R. v. Lawrence, 1 Leg. Chron. Rep. 371 (1873).

and the partnership was dissolved. Subsequently the railroad company paid to the partner who had bought the interest of his co-partner, damages for the location of the road. It was held that the retiring partner was entitled to his share of the damages.¹

Lessee of Market Stall.

130. The lessee of a stall in a market has no such estate as will entitle him to damages if the market-house is condemned by a railroad.²

Owners of Ground-Rents.

131. The owner of a ground-rent having a separate estate from the owner of the land is unaffected by proceedings against the latter to take the land under the right of eminent domain. He has his remedies unimpaired against the lot for his rent, and so long as that is regularly yielded, according to the reservation, he stands in no need of relief. WOODWARD, J., said: "The equity of the plaintiff's bill is founded on the assumption, that he, as the owner of the ground-rent, is affected by the proceedings of the railroad company against his tenants, and yet, he assigns an excellent reason why he is not affected by these proceedings, to wit, that he was not a party to them. He and his tenants had distinct estates in fee—his incorporeal, theirs corporeal—each subject to the distinct act of separate owners, and separate taxations. It has been held (1 Barr, 349), that a sale of land for taxes, subsequent to a reservation of the ground-rent, will not cut it out; and by an Act of Assembly of January 23, 1849, the ground-rents of Philadelphia are expressly saved from the effects of such sales. So distinct

¹ Blackiston's Ap., 32 P. F. Smith, 339 (1876).

² Strickland v. Pennsylvania R. R., 154 Pa. 348 (1893).

are the freeholds, which vest in the landlord and his ground-rent tenants. The railroad company took the ground not the ground-rent. Their proceedings were against another, and an entirely distinct estate from that which the plaintiff held. Of course he is unaffected by anything that was done. But he complains that it was substantially an apportionment of the ground-rent, without his consent, and he prays that apportionment of the principal of the ground-rent may be decreed. A ground-rent being a rent service, and not a rent charge, is undoubtedly apportionable, and may be partially released, without extinguishing the whole; and if part of the ground be taken for public use of a highway, equity will apportionate the rent, in relief of the tenant, compensating the ground landlord out of the damages awarded: 1 Wh. 337; 4 W. 98; 9 Wh. 262; 3 Wh. 357.

"But here the tenants are seeking no relief in equity, and that the appropriation to public use, of part of a lot, held on ground-rent, so as to entitle the landlord to call for the extinguishment of it *pro tanto*, was very satisfactorily demonstrated in *Workmen v. Mifflin*, 6 Casey, 362.

"The doctrine of that case, not inconsistent with the ruling in *Cuthbert v. Kuhn*, 3 Wh. 357, is decisive against the plaintiff.

"He had his remedies unimpaired against the lot, for his rent, and so long as that is regularly yielded, according to the reservation, he stands in need of no relief."¹

Landlord of Property Leased to Railroad.

132. The laying of tracks on land leased by a railroad company is not such an appropriation of the land as will

¹ *Voegtley v. Pittsburgh & Fort Wayne R. R.*, 2 Grant, 243 (1859).

entitle the landlord to institute proceedings for damages. "The question of damages depends on the taking—that is to say, the appropriation of the property to railroad purposes. This is a very different thing from a mere use of the property under a lease of years. There is nothing to prevent a railroad company having title to the use and occupancy of land under a lease, from laying down rails upon it and using them as a track for their engines, cars, etc., if not forbidden in the lease, or if waste is not committed by such acts as evidently injure and destroy the soil. But an appropriation of the property for the uses of a railroad under the power granted to take it for such a purpose is essentially different from such a mere use during the term of a lease. In the latter case no title is acquired to the easement, and the rails must come up before the expiration of the lease; but in the former a perpetual easement or right of way takes place. In one case, the rent is all the compensation which the landlord can demand; in the other, the owner is entitled to compensation or security for it before his right of property can be evaded."¹

Evidence Admissible on Question of Damages—Advantages to Business of Owner.

133. The jury must value the property without reference to the person of the owner or the actual state of his business; but the railroad company may show that a siding could be conveniently constructed upon the property, and also how such a construction might be made useful to the premises. The fact that the owner refused to avail himself of the advantages thus afforded is of no moment, for the question is not as to the disposition of the owners of the property, but whether or not the facili-

¹ AGNEW, J., in *Heise v. Pennsylvania R. R.*, 62 Pa. 67 (1869).

ties afforded by the improvement have advanced the market value of the property. The jury may also consider the fact that owners of mills and factories have a right to connect their private sidings with the railroads in their vicinity, as such privileges must have some effect upon values.¹

Where there is a canal upon plaintiff's land the fact that before the railroad was constructed the canal afforded the plaintiff a cheap and sufficient means of conveying his products to market, is material on the question of damages; and the fact that the canal belonged to the railroad company and might be abandoned by it does not vary the case.²

In a proceeding to assess damages for the taking of land used as a quarry, it appeared that when the quarry was originally opened that a canal was the only available line of transportation for its products. The Reading Railroad afterward built a branch across the Schuylkill River in the neighborhood of the quarry, but charged an additional rate of ten cents per ton on all freight passing over this branch, so that shipment of heavy freight over this line did not seem to have been desirable for the owners of the quarry. The defendant's road was built to and across the plaintiff's lands. It was held that whether this additional line of transportation was or was not an advantage to the owners of the quarries was a proper subject for consideration by the jury.³

The railroad company may show that it had built a station in such a position as to be convenient to the landowner's business establishment.⁴

The jury cannot consider that the railroad will not be

¹ *Pittsburgh & Lake Erie R. R. v. Robinson*, 95 Pa. 426 (1880).

² *Pennsylvania & New York R. R. and Canal Co. v. Bunnell*, 81 Pa. 414 (1876).

³ *Reading & Pottsville R. R. v. Balthaser*, 126 Pa. 1 (1889).

⁴ *Pittsburgh & Lake Erie R. R. v. Robinson*, 95 Pa. 426 (1880).

a benefit to the owner's business, because he is already served by other railroads.¹

That additional facilities for the transportation of the products of the land are afforded by the railroad may be shown by the railroad company as an element of advantage, but evidence of specific rates prevalent at a particular time are inadmissible, as such rates are not permanent but fluctuating.²

Advantages in reduction of damages are to be confined to those which are peculiar to the owner, excluding those which he shares with other members of the community whose property is not taken.³

Injuries to Special Business.

134. Evidence as to the business that a man was engaged in at the time he was injured is proper. Thus it may be shown that a man was engaged in dealing in land; that he had a quantity of land on hand, and that there was reasonable certainty of profits from the sale of the land.⁴

Plaintiff claimed to recover damages for injuries caused by the construction of a railroad through a marble yard abutting on the river. The principal injury for which damage was claimed was the loss of storage space under a traveling crane. The court charged that the measure of damages was the difference between the market value of the land before and after the construction of the railroad. The court further charged: "If the jury believes from the evidence that the loss of storage space under the traveler is the principal cause of the plaintiff's claim that the railroad has injured the property, and that such space

¹ *Patten v. Northern Central Ry. Co.*, 33 Pa. 426 (1859).

² *Reading & Pottsville R. R. v. Balthaser*, 119 Pa. 472 (1888).

³ *Short v. Rochester & Pittsburgh R. R.*, 8 Atl. Rep. 596 (1887).

⁴ *Pennsylvania R. R. v. Dale*, 76 Pa. 47 (1874).

under the control of the same traveling crane can be duplicated by suitable mechanical appliances under the control of his machinery, rendering the mill property available for its full use, then the cost of such appliances can be considered not as an item of damage, but as a measure of the injury, if any, to the land, due to the taking of a portion of the space controlled by the traveler and heretofore used for storage purposes." It was held that there was no error in so charging.¹

In estimating the value of clay and gravel taken from plaintiff's land to make an embankment the jury may take into consideration the fact that the plaintiff had a market for clay and gravel, and could also estimate the amount taken by the cubic yard.²

Injuries to Mills.

135. Evidence may be admitted to show how the trade or custom of a mill was affected by the construction of a railroad; that, by reason of the proximity of the railroad to the mill, it was inconvenient and dangerous for persons with teams and wagons going to and from it, and that the effect of this was to decrease or destroy the business and custom of a mill, and consequently to lessen its value. If the peril and inconvenience to customers from this cause was such that they were thereby induced to carry their grain to be ground to other mills, and the plaintiff's land was thereby depreciated, the taking of the plaintiff's property and the construction of the railroad thereon were the direct and immediate cause of this injury.³

An injury to the unused and surplus water-power of a mill is a proper object of compensation, and the measure

¹ *Baird v. Schuylkill River East Side R. R.*, 154 Pa. 459 (1893).

² *Philadelphia & Reading R. R. v. Gilson*, 8 Watts, 243 (1839).

³ *Pittsburgh, Virginia & Charleston Ry. v. Vance*, 115 Pa. 325 (1887).

of damages is the actual market value of the power for any useful purpose.¹

Damages may be allowed for the decreased business of a mill where it appears that the mill stood on a narrow strip of land between a river on one side and a high bluff on the other, and that the railroad was located at the side of a township road running in front of the mill, and that the only access to the mill was along this road.²

The jury may take into consideration injuries to a water-power situated on one of the smaller streams of the State.³

Injuries to Farms.

136. In determining the damage of a farm appropriated by a railroad company for its road, evidence of the elements of computation of disadvantages, the manner the road cuts through the tract, the fields it spoils, the fencing rendered necessary, ditching, embankments, deep cuts, and the like is admissible to enable the viewers or the jury to reach a just conclusion upon the whole matter.⁴

The jury may consider the disadvantages resulting from the manner in which a farm is cut. In *East Pennsylvania R. R. Co. v. Hottenstein*,⁵ THOMPSON, J., said: "The market value of the land taken has in more than one case been affirmed to be the proper standard to be adopted in estimating the damages done by railroads in passing through private property. At present we need cite only *Searle v. The Lackawanna & Bloomsburg Railroad Co.*, 9 Casey, 57. While this, at first blush, seems an inade-

¹ *Dorlan v. East Brandywine & Waynesburg R. R. Co.*, 46 Pa. 520 (1864).

² *Western Pennsylvania R. R. v. Hill*, 56 Pa. 460 (1867).

³ *Barclay Railroad & Coal Co. v. Ingham*, 36 Pa. 194 (1860).

⁴ *Danville, Hazleton & Wilkes-Barre R. R. v. Gearhart*, 2 Leg. Chron. Rep. 360 (1875); *Wilmington & Reading R. R. v. Stauffer*, 60 Pa. 374 (1868).

⁵ 47 Pa. 28 (1864).

quate medium of remuneration to the owner, seeing that it is generally but a narrow strip often taken out, it may be, of the centre of the farm, yet in addition to this the jury may, and very often do, allow for the disadvantages to the farm from the manner in which it may be cut by the projected or constructed road. It is always allowed for, unless, indeed, the advantages to the whole property outweigh it, and then, by our construction of the Act of 1849, courts allow the amount of the preponderating advantages to stand against the value of the property taken or other specific injury done."

Injuries resulting from severing parts of a farm that have necessary relation to each other are elements in considering the value of the entire farm.¹

The jury may allow for damages arising from inconvenience in crossing the railroad, and interfering with crossings already established.²

Cost of Fencing as an Element of Damage.

137. In estimating the damages that may be recovered against a railroad company for the taking of land, the cost of fencing cannot be allowed as a distinct item of damage, but the question how much the burthen of fencing will detract from the value of the land may be considered by the jury.³

The increased burden of fencing rendered necessary by

¹Pittsburgh, Virginia & Charleston R. R. v. Bentley, 88 Pa. 178 (1878).

²East Penn. R. R. Co. v. Hiesler, 40 Pa. 53 (1861).

³Montour R. R. v. Scott, 11 W. N. C. 51 (1881); s. c. 1 Pennypacker, 503 (1881); Griffin v. Pennsylvania Schuylkill Val. R. R., 1 Montgomery Co. Rep. 169 (1885); Pittsburgh, Bradford & Buffalo Ry. v. McCloskey, 110 Pa. 436 (1885); Delaware, Lackawanna & Western R. R. v. Burson, 61 Pa. 369 (1869); Danville, Hazleton & Wilkes-Barre R. R. v. Gearhart, 2 Leg. Chron. Rep. 360 (1875). It is proper to ask "How much less would the whole farm sell for in market on account of additional fencing made necessary by the road?" Pennsylvania & New York R. R. and Canal Co. v. Bunnell, 81 Pa. 414 (1876).

the location and construction of the railroad may be considered in assessing the owner's damages, but only so far as it depreciates the market value of the property; and this is the case even in the counties where the local Act of April 9, 1868, P. L. 779, applies, if increased fencing is necessary in order to render the land convenient for use as a farm.¹

Where a railroad was located and damages assessed to a prior property-owner before the passage of the local Act of March 28, 1868, P. L. 514, which requires railroad companies in certain counties to construct and keep in repair fences along their tracks, in such case the railroad company is not subject to the burden of fencing, as the presumption is that the assessment of damages included that burden. McCOLLUM, J., said: "The burden of fencing created by the location and construction of a railroad is a charge upon and detracts from the value of the farm through which it passes. This burden may not be limited to, but it certainly includes the fencing called for by the act under consideration. When the landowner in a proceeding for the assessment of his damages has received compensation for the burden thus imposed, his claim for all fencing made necessary by the construction of the railroad is satisfied, and for such fencing thereafter, whether it is required for his own convenience and protection or for the public safety, he can have no valid claim against the company. It is work done in partial discharge of a burden on his own land, for which he has already been paid. His successor in the ownership of the land, whether as grantee, heir, or devisee, takes it *cum onere*, and has the same rights and duties in relation to the fencing of it as the person from whom he derived title. As already intimated we are of opinion that the

¹Curtin v. Nittany Valley R. R., 135 Pa. 20 (1890).

tatute under consideration does not undertake to settle the question of the ultimate responsibility for fencing in a case like the present. If it assumed to do so, and required the appellant to finally bear this burden, it would be fairly open to the objection that the legislature had not the constitutional power to enact it. Legislation which demands that one person shall assume and pay the private debt of another is void for want of such power; and an act to compel a railroad company to bear a burden resting upon the land of another and for which it has once compensated him, would be in the same category."¹

Risk from Fire not Resulting from Negligence.

138. The ordinary risk of fire not resulting from negligence is a matter proper to be considered by the jury in determining the extent to which the market value of the property has been depreciated.² The fact that spe-

¹Wells v. Northern Central Ry., 150 Pa. 620 (1892).

²Setzler v. Pennsylvania Schuylkill Valley R. R., 112 Pa. 56 (1886). See *contra* the early case of Sunbury & Erie R. R. v. Hummell, 27 Pa. 99 (1856), where Lowrie, J., said:

"Is it reasonable to infer that remote and contingent future change, such as accidental fire from locomotives, was intended to be estimated and paid for? We think it is not. We find no Act of Assembly that indicates that such a thing was ever thought of. The legislature never had anything like it in its mind when providing for public improvements. The law proclaims its general rule, that it has no remedy for merely accidental injuries; and when providing for the construction of internal improvements, it has uttered no new one. It has given no recompensation for the risk of bridges burning or falling, lock or toll-houses taking and commencing fire, stationary engines exploding, locomotives running off the track into a man's house, dams and locks giving away and inundating his land, or anything of that kind.

"And why should it? If it takes a man's land or injuriously affects his property by the improvement, it gives him full compensation according to the best estimate that it is competent to obtain; and why should he have more? True, his risks may be increased by the improvements; but so is it with every man along the road, even though his land be passed without touching it, and why should one be paid for the risk and the other not? In going along streets, the

cific evidence was not given in relation to damages from fire, does not exclude that subject from consideration, when it is shown conclusively, that, in point of fact, there are several buildings on the premises, and their respective proximity to the road is evident. The subject, of course, could only be considered in the general way of estimating the value of the whole property before and after the building of the road, and not at all as an object of specific allowance.¹

The fact that a building was so near to the railroad that it was necessary for it to be removed by reason of its liability to be burned, may be considered by the jury on the question of damages.²

If from the proximity of the railroad to a barn the danger of fire is necessarily so imminent that no man of common prudence would use it for the purposes of a barn, but would be driven from it and compelled to provide himself with a barn elsewhere, then the owner is clearly injured in this respect, and the jury must con-

locomotives may pass under the very eaves of a thousand houses without paying in advance for the risk. The improvement increases the risk; but so does improvement by the erection of mansions, and especially of all sorts of steam works, but no one gets compensation for such risks.

"It is a simple law of nature that he who lives in society must take the risk of those social accidents which society knows not how to prevent. The incidental hazards must stand as balanced by the incidental benefit of the social state.

"It is also relevant to this question of reasonableness to ask how the risk is to be measured. There may be but a single shanty on the land of the claimant, and if we are to provide for future risks, the duty is not satisfied by merely ascertaining the risk of the shanty, for there may yet be a hundred houses there; how can it be told how many, or of what kind or value? And who can calculate the chances of accidental fire? We know not yet the kind of fuel that may be used; nor the improvements to be made for preventing the emission of sparks; nor how soon there will be another element than fire and steam for locomotive power, nor whether there will be one or one hundred locomotives daily along the road."

¹ Hoffman v. Bloomsburg & Sullivan R. R., 143 Pa. 503 (1891); Lehigh Valley R. R. v. Lazarus, 28 Pa. 203 (1857).

² Philadelphia & Reading R. R. v. Rogers, 2 Walker, 275 (1864).

sider it in estimating the effect of the road on the property.¹

In estimating the damages due to tenants, the jury may consider the fact that the location of the railroad compelled the removal of the business conducted by the tenants, and the depreciation in value of the leasehold and also of the machinery and personal property of the tenants used in their business.²

Tax Assessments as Evidence.

139. Where the assessed value of land has been admitted in evidence it is not improper for the court to charge that the assessments were not of much value as evidence, but that they were matters for the jury to consider in connection with other testimony.³

If the land-owner has been an assistant assessor during the year in which the land was condemned, the assessment is admissible as evidence of much weight, but it does not operate as an estoppel in favor of the company. The claimant may therefore testify that he took no part in the assessment, and that it was much lower than the real value of the land.⁴

Additional Servitude.

140. It is not necessary that the public easement in a street should be destroyed to enable the owner to recover for an additional servitude imposed upon his land.⁵

The owner in fee of land occupied by a turnpike company who has receipted in full for damages to the com-

¹ *Wilmington & Reading R. R. v. Stauffer*, 60 Pa. 374 (1869).

² *Getz v. Philadelphia & Reading R. R.*, 105 Pa. 547 (1884).

³ *Schuylkill River & East Side R. R. v. Stocker*, 123 Pa. 233 (1889).

⁴ *Smith v. Pennsylvania & Schuylkill Valley R. R.*, 141 Pa. 68 (1891).

⁵ *Jones v. Erie & Wyoming Valley R. R.*, 151 Pa. 30 (1892).

pany may subsequently recover damages from a railroad company which has taken the road, although the railroad occupied no more ground than was contained within the limits of the turnpike road.

In *Mifflin v. Harrisburg, Portsmouth, Mount Joy & Lancaster R. R.*,¹ BELL, J., said: "The soil over the surface of which the turnpike ran remains in the original owners or their alienees. During its appropriation to the purposes of the turnpike, those owners might have maintained an action of trespass against the directors of the corporation had they attempted to construct over its site a railroad without special authority, or turned it to any other use than that authorized by their charter: *Ridge Turnpike v. Stover*, 6 W. & S. 378; for it is undoubted that land taken under authority of law for the construction of a turnpike or other road cannot be used for some other purpose, but the State is bound to protect the highway and preserve its uses according to the terms of the concession: 1 Bald. 230; 16 Mass. 35. If, then, by the payment of the original damages, the first company purchased under its charter but the right of constructing and using a turnpike over the surface of the soil, it is obvious it could, of itself, unassisted by legislative action, have conveyed no interest beyond this to the second company. As alienees, the latter corporation could not have excavated a shovelful of earth but at the hazard of an action. Their right to do so is something greater and different from any interest derived or privilege purchased from the older company. It is, therefore, to be regarded precisely as though it were an original grant by an exercise of the legislative power, and its enjoyment is subject to all the conditions and restrictions to which the legislature has seen fit to subject it."

¹ 16 Pa. 182 (1851).

A railroad company which has acquired the property and franchises of a canal company cannot lay its tracks upon land over which the canal company had merely a right of way, without making compensation to the land-owner.¹

Miscellaneous Matters of Evidence.

141. Increased difficulty in renting property, owing to the construction of the railroad, may be shown.² A jury may consider to what extent the value of the land is affected by the fact that city streets were plotted upon it and might some day be opened, but they cannot consider such streets as opened streets.³

The presence and effect of a sewer outlet on a lot abutting upon a navigable river, a part of which was taken by a railroad, and whether the subsequent removal of the sewer was due to the construction of a railroad, are questions to the jury.⁴

Where a railroad company in constructing its road deposited stones and earth upon the owner's land, outside of the sixty feet appropriated to the road, there was a taking of land which was a proper subject for compensation.⁵

The owner of a spring of water situated on his land adjoining a navigable river below high-water mark is entitled to damages if the spring is destroyed by the construction of a railroad.⁶

The land-owner may show that the company has appropriated more land than is designated in the company's draft and description.⁷

¹ *Pittsburgh & Lake Erie R. R. v. Bruce*, 102 Pa. 23 (1883).

² *Pittsburgh, Virginia & Charleston R. R. v. Rose*, 74 Pa. 362 (1873).

³ *Schuylkill River & East Side R. R. v. Stocker*, 128 Pa. 233 (1889).

⁴ *Harris v. Schuylkill River & East Side R. R.*, 141 Pa. 242 (1891).

⁵ *East Pennsylvania R. R. Co. v. Schollenberger*, 54 Pa. 144 (1867).

⁶ *Lehigh Val. R. R. Co. v. Trone*, 28 Pa. 206 (1857).

⁷ *Pennsylvania & New York Canal & R. R. Co. v. Roberts*, 2 Walker, 482 (1881).

The declarations of the owner of land as to the offer of the land at a fixed price and a sale of the portion of it are proper evidence on the question of value.¹

If a railroad agrees to erect a building in place of one partly destroyed by the construction of a railroad, and the owner subsequently accepts the building thus constructed and makes no objection to the cost, which, under the agreement was to be an offset to the damages awarded, the jury in assessing the damages may take into consideration the cost of the building.²

Evidence Inadmissible on Question of Damages—Profits of Business.

142. The value of the land is not to be measured by any particular use. The uncertainty of the business the owner will be engaged in and the uncertainty of the profits of the business is the reason for excluding testimony as to particular use. Thus it is improper to charge the jury that in considering and comparing the advantages and disadvantages of the railroad to the plaintiff they were to regard only such as resulted through him as a farmer and to his land as a farm.³

While the use to which the property has been or may be applied is proper for the consideration of the jury, it is improper to permit the jury to take into consideration any supposed loss to the plaintiff of profits in his business.⁴

If the company enters without filing a bond, the tenant may recover damages in an action of trespass against the company. In such a suit the measure of damages is the value of the leasehold in excess of the rent. The

¹ East Brandywine & Waynesburg R. R. v. Ranck, 78 Pa. 454 (1875).

² Rees v. Schuylkill River & East Side R. R., 135 Pa. 629 (1890).

³ Shenango & Allegheny R. R. v. Braham, 79 Pa. 447 (1876).

⁴ Pittsburgh & Western R. R. v. Patterson, 107 Pa. 461 (1884).

tenant, however, cannot be permitted to say: "If I had stayed on there, rather than moved away it would have paid me \$1,000 a year." Such testimony is in the nature of an estimate of future profits, and is improper for the consideration of the jury.¹

Where no evidence is offered to show injury to a business, it is proper to instruct the jury that they have no right to base their verdict upon a mere guess.²

The General Appreciation of Property.

143. The general appreciation of property in the neighborhood, consequent to the projected construction of the road, cannot enter into the calculation; to this the land-owner whose lands have been taken is as fairly entitled as is his neighbor whose possessions and enjoyment have not been disturbed. The general increase of value, resulting from the growth of public improvement, railroads, canals, and highways, accrues to the public benefit, and in the computation of damages the land cannot be charged therewith. The question in each case is whether or not the special facilities afforded by the improvement have advanced the market value of the property beyond the mere general appreciation of property in the neighborhood.³

Price of Other Lands in Neighborhood.

144. Evidence of particular sales of alleged similar properties under special circumstances is inadmissible to establish market value. The selling price of lands in the neighborhood at the time is a test of value, but it is the general selling price, not the price paid for particular

¹ *Pennsylvania R. R. v. Eby*, 107 Pa. 166 (1884).

² *Paid v. Schuylkill River East Side R. R.*, 154 Pa. 463 (1893).

³ *Setzler v. Pennsylvania Schuylkill Valley R. R.*, 112 Pa. 56 (1886).

property. A particular sale may be a sacrifice, compelled by necessity, or it may be the result of mere caprice or folly. If such sales were given in evidence they would raise collateral issues as numerous as the sales themselves.¹

It is incompetent for the railroad company to prove what they had paid to other property-owners along the same street with the privilege of laying their tracks upon it. What particular owners were willing to accept, or had accepted from the company by way of settlement or compromise would not affect the plaintiffs.²

Evidence that other land-owners released their right to damages is not evidence of the benefit of a railroad as against a land-owner who did not release his damages.³

Watering Place for Cattle.

145. A watering place for plaintiff's cattle and stock if situated on a public highway, and within the boundaries of the farm of an adjoining owner, is not an element of damage to be considered by the jury. In such a case the plaintiff was merely deprived of what did not belong to him.⁴

An owner of land cannot claim as an element of damages that the construction of a railroad has cut off its access to a canal for the purpose of watering his cattle.

¹ Pittsburgh & Western R. R. v. Patterson, 107 Pa. 461 (1884); Pittsburgh, Virginia & Charleston R. R. v. Rose, 74 Pa. 362 (1873); Curtin v. Nittany Valley R. R., 135 Pa. 20 (1890); Pittsburgh, etc., R. R. v. Patterson, 107 Pa. 61; East Pennsylvania R. R. v. Heister, 40 Pa. 53 (1861).

The general selling price of lands in the neighborhood cannot be shown by evidence of particular sales of alleged similar properties; it is a price fixed in the mind of the witness from a knowledge of what lands are generally held at for sale, and at which they are sometimes actually sold, *bona fide*, in the neighborhood: Pittsburgh, Virginia & Charleston Ry. v. Vance, 115 Pa. 325 (1887).

² Pennsylvania Schuylkill Valley R. R. v. Ziemer, 124 Pa. 560 (1889).

³ Philadelphia, Wilmington & Baltimore R. R. v. Patterson, 3 Walker, (1874).

⁴ Gorgas v. Philadelphia, Harrisburg & Pittsburgh Ry., 144 Pa. 1 (1891).

Under the Act of April 10, 1826, the taking of cattle upon the bank of a canal for the purpose of watering is an offense punishable by fine and imprisonment.¹

Mineral Lands.

146. The viewers cannot take into consideration the possible expense and inconvenience to which the landowner may be put when he begins to open mines beneath the surface of the land taken by a railroad company.

In *Searle v. Lack. & Bloomsburg R. R.*,² LOWRIE, C. J., said: "The State allows for all actual damages to existing improvements, especially in case of railroads; and that has been done here. But, so far as regards the unopen coal veins on this land, we may treat the case as one of wild lands. Over such the State makes its roads with simple reference to public convenience. It allows no damages on account of the fact that, when the owner comes to improve, he must go to great expense in adapting his improvements and his roads to the public road. It counts not at all on the minerals under the road; to do so, would obstruct all improvement of such land; and yet mineral lands must have roads, as well as other lands on similar terms. It cuts through high ground and fills up low, without allowing for the difficulty which the owner may some day have in getting at or over the road. It usually does the same, even through improved lands: 8 W. & S. 85; though it does not always permit railroad companies to do so: 16 State R. 191.

"In relation to wild lands, such operations are no present injury, except in a purely imaginary sense. They may some day prove an obstruction; and yet it is impossible to tell what changes of roads and other avenues of com-

¹ *Philadelphia & Reading R. R.*, 12 Pa. C. C. R. 513 (1892).

² 33 Pa. 57 (1859).

munication, and what changes in the value of the land, and of its products, may take place before that day arrives; and it is impossible to decide now what the injury would then be, or that it would be any. It may be that before this coal begins to be mined, the surface will be occupied by improvements needing this road, and presenting themselves greater obstructions to mining than the road is, because the mining must regard their safety: 12 Q. B. 739."

The value of land as mineral land may be considered, but not the value of the mineral itself underneath the road.¹

In an action for land damages by construction of defendant's railroad, the defendant, in order to show advantage to plaintiff's land, offered evidence that a hill on his farm which contained some ore was part of a range of ore banks which had been profitably developed on adjoining properties. It was held that the evidence was properly excluded.²

In a proceeding to assess damages for mineral lands witnesses may not be allowed to estimate the damages sustained by the plaintiffs by calculating the number of tons of limestone under the surface of the right of way, and multiplying that by the estimated price per ton, reaching a value of several thousands of dollars per acre. Such a method involves an uncertain estimate of the quantity and quality of the stone, includes necessarily the use of the labor and capital, requires skill and intelligent supervision on the part of the operator, and vigilance and success in the financial management. "No human mind can foresee the presence of these elements of business success, or forecast the profit or loss of actual operations, if the stone be removed at the ordinary rate of quarrying. The true

¹ Reading & Pottsville R. R. v. Balthaser, 119 Pa. 472 (1888).

² Harrisburg & Potomac R. R. v. Stayman, 2 W. N. C. 103 (1875).

rule is that which quits the realm of speculation, and comes down to what is within the knowledge of business men living in the neighborhood, viz., what was the fair selling value of the property before the defendant entered upon it? What is its fair selling value as affected by that entry? The difference is the true measure of the loss sustained by reason of the entry."¹

An owner of the soil of a highway has no right to recover damages from a railroad company for the removal of a coal tramway which the owner had laid without authority of law.²

Ferry.

147. A lawful construction of a railroad over a street, or of a bridge over a river, though likely to diminish the receipts of a ferry, is not an injury to private property in the franchise of the ferry within the intendment of the Constitution.³

The measure of damages for which a railroad company is liable for taking land leased to the owner of a ferry is the difference between the value of the leasehold for the purpose of a ferry until the end of the term under ordinary circumstances, and its value for the same time as affected by the construction of the railroad. The owner of the ferry, however, cannot recover damages for the depreciation of the value of the ferry unconnected with the leasehold.⁴

City Lots.

148. Evidence as to how many building lots a land could be divided into and what such lots would be worth

¹Reading & Pottsville R. R. v. Balthaser, 126 Pa. 1 (1889).

²Harvey v. Lackawanna & Bloomsburg R. R. Co., 47 Pa. 428 (1864).

³Pittsburgh & Lake Erie R. R. v. Jones, 111 Pa. 204 (1885).

⁴Pittsburgh & Lake Erie R. R. v. Jones, 111 Pa. 204 (1885).

separately is inadmissible. "The jury are to value the tract of land, and that only. They are not to determine how it could best be divided into building lots, nor conjecture how fast they could be sold, nor at what price per lot. A speculator or investor in deciding what price he could afford to pay, would consider the chances and probabilities of the situation as then actually existing. A jury should do the same thing. They are not to inquire what a speculator might be able to realize out of a re-sale in the future, but what a present purchaser would be willing to pay for it in the condition it is now in."¹

Where a railroad is located through suburban property, a map which shows the premises divided into city lots contrary to actual conditions is inadmissible.²

Where a witness testifies that the land as a whole was worth a certain amount for farming purposes and double the amount for lots, he may be asked on cross-examination by plaintiff whether he had not offered a largely increased sum per acre for ten acres before the railroad was contemplated.³

Injuries Subsequent to Completion of Railroad.

149. Injuries sustained after a railroad is completed do not constitute elements of damage in condemnation proceedings.⁴

What the railroad company may propose to do afterward in the way of improvement, unconnected with the finishing of their railroad, cannot be considered in determining the damages. The company may or may not ac-

¹ *Pennsylvania Schuylkill Valley R. R. v. Cleary*, 125 Pa. 442 (1889).

² *Myers v. Schuylkill River East Side R. R.*, 5 Pa. C. C. R. 634 (1888).

³ *Danville, Hazleton & Wilkes-Barre Railroad Co. v. Gearhart*, 32 P. F. Smith, 260 (1875).

⁴ *Gilmore v. Pittsburgh, Virginia & Charleston R. R.*, 104 Pa. 275 (1883).

ording to its pleasure carry out its proposed improvements, and if the damages are reduced on account of them, and the company afterward fails to carry them out, the land-owner would be without remedy.¹

Damages that may be sustained from the negligent or unskillful management of the road cannot be taken into consideration.²

Increased Competition of Strangers.

150. An increased competition with the plaintiff by other parties in the same business caused by the construction of a railroad is no ground for damages.³

The jury cannot consider that by the taking of his land for the railroad, the owner is deprived of the advantages of keeping off other persons from his neighborhood, and thus saving himself from the annoyance and risk of their proximity.⁴

Increased Insurance.

151. Increased rates of insurance because of danger to property from locomotives cannot be considered.

In *Patton v. Northern Central Ry. Co.*,⁵ LOWRIE, C. J., said: "We have already decided, that the occasioning of such risk by the lawful use of property is not an injury, in the sense of a wrong done to another: 28 State Rep. 202; 27 State Rep. 99. And we did not base this conclusion merely on the impossibility of calculating the risk in advance for all future circumstances. But if we had done so, that impossibility is not disproved by showing the presence of insurance under the now existing circum-

¹*Pittsburgh, Virginia & Charleston R. R. v. Rose*, 74 Pa. 362 (1873).

²*Pittsburgh, Bradford & Buffalo Ry. v. McCloskey*, 110 Pa. 436 (1885).

³*Harvey v. Lackawanna & Bloomsburg R. R. Co.*, 47 Pa. 428 (1864).

⁴*Patton v. Northern Cent. Ry. Co.*, 33 Pa. 426 (1859).

⁵33 Pa. 426 (1859).

stances. Insurance does not make that certain which was before uncertain. It merely assumes the risk of defined circumstances, for a compensation based upon an approximate calculation of chances, and is itself a mere speculation upon assumed uncertainties. Besides this, a man who is not liable for accidental fire, cannot be liable to insure against it."

Improvement on Owner's Land Outside of Appropriation.

152. A railroad company constructed its road across an unimproved city lot abutting upon a navigable river, the company was compelled to erect a bulkhead at the port wardens' line, outside of its appropriation, agreeing with the land-owner that it should be built without cost or expense to him. It was held that the construction of the bulkhead would not be considered as an element of the advantage to the property in mitigation of damages. The court said: "The value of the lot at the time of the taking is the value as it was, not as it might have been with improvements, though the availability for these is, as already said, an element in its value as it is. And the value of the rest of the lot after the taking is also its value as it then is, not as it is when improved. And both values, before and after the taking, are the general market values of the particular lot, considering such advantages or disadvantages as are special and peculiar to it, without reference to the general rise or fall common to it, with other property in the neighborhood, consequent upon the coming of the railroad. The main question, however, is upon the effect, as to damages, of the building of the bulkhead by the railroad company on the port wardens' line. As this was entirely outside of the strip of land taken for the right of way, the company were bound to show some authority for putting it there."

Otherwise it was a trespass, for which they were not only not entitled to claim that it benefited the property, but were liable in damages. The claim made at the argument that good engineering required the bulkhead to be put where it is, only needs the obvious answer that, if so, the company should have condemned that part of plaintiff's lot, and paid for it in the regular way. Their acquisition of the sixty-feet-wide strip for railroad purposes give them no right to put retaining walls or abutments or bulkhead upon any other part of plaintiff's lot, and all contention to that effect must be dismissed from the case.

"The only authority that defendant did show was the agreement of Harris, as set forth in the letter from Ellis to him, dated October 27, 1885. It is true Harris wrote a letter in answer, in which he made a counter-proposition which he says was accepted, but which Ellis says was refused. For the purpose of this case, it is immaterial which is right. The counter-proposition stipulated, in a certain contingency, that the railroad company should keep the bulkhead in repair satisfactory to the port wardens. No question, as to whether this would be relevant, appears in the present case. The rest of Harris's proposition is no more than putting in express terms, *ex majore cautela*, what was already in Ellis's letter. The terms of this were that, in consideration of Harris, as owner, signing the application to the port wardens, through which alone the necessary permission to build the bulkhead on the wardens' line could be had, Ellis agreed that the bulkhead should be built 'without cost or expense to you (Harris) either for labor or material.' Harris's answer added that 'any supposed benefit to me shall not be alleged in mitigation of any damages by reason of your taking your right of way over my property.' It was argued that the expression,

'cost or expense, either for labor or material' meant only that Harris should not be called upon to pay out cash for the work. But this is too narrow a construction. It may be a convenience to be relieved from the necessity of a present outlay of money, but what substantial advantage is it, if the amount can be immediately afterward deducted from money which would otherwise come to the owner of the land? If he has to pay for the bulkhead in either way, it is cost and expense to him which the company indemnified him against. The situation was this: The company had no authority to put the bulkhead outside of its own right of way; good engineering suggested that it should be put on the water line, and this could only be done by the owner's consent; the owner did consent on the agreement that it should be done without cost or expense to him. The substance of the agreement is that permission was given to build the bulkhead where it would be most useful, but it was to be done without expense, direct or indirect, to the owner of the land. The fair business sense of the words is the legal sense; and to hold that he should pay for it by diminution of the damages for taking his land would be a violation of both. All consideration of the location of the bulkhead at the wardens' line must be omitted in the estimation of the damages."¹

Improvements Made by Company before Condemnation.

153. Ties, rails, and other structures placed by a railroad company upon land which it has taken without making compensation to the owner or filing a bond, cannot be considered as an element of damages in subsequent condemnation proceedings instituted by the railroad company. "This is not the case," said Chief Justice

¹ Harris v. Schuylkill River & East Side R. R., 141 Pa. 242 (1891).

AGNEW, "of a mere trespass by one having no authority to enter, but of one representing the State herself, clothed with the power of eminent domain, having a right to enter, and to place these materials on the land taken for a public use—materials essential to the very purpose which the State has declared in the grant of the charter. It is true the entry was a trespass, by reason of the omission to do an act required for the security of the citizens, to wit: to make compensation or give security for it. For this injury the citizen is entitled to redress. But his redress cannot extend beyond his injury. It cannot extend to taking the personal chattels of the railroad company. They are not his, and cannot increase his remedy. The injury was to what the landlord had himself, not to what he had not. Then why should the materials laid down for the benefit of the public be treated as dedicated to him? In the case of a common trespasser, the owner of the land may take and keep his structures *nolens volens*, but not so in this case; for though the original entry was a trespass, it is well settled that the company can proceed in due course of law to appropriate the land, and consequently to reclaim and avail itself of the structures laid thereon. . . . Another evident difference between a mere tort-feasor and a railroad company is this: the former necessarily attaches his structure to the freehold, for he has no less estate in himself, but the latter can take an easement only, and the structures attached are subservient to the purpose of the easement. A railroad company can take no freehold title, and when its proper use of the easement ceases, the franchise is at an end. There is no intention in fact to attach the structure to the freehold. We have therefore these salient features to characterize the case before us, to wit: the right to enter on the land under authority of law to build a railroad for public use;

the acquisition thereby of a mere easement in the land; the entire absence of an intention to dedicate the chattels entering into its construction to the use of the land; the necessity for their use in the execution of the public purpose; and, lastly, the power to retain and possess these chattels and the structures they compose, by a valid proceeding at law, notwithstanding the original illegality of the entry. For the latter the owner has his appropriate remedies; his action of ejectment to recover and retain his land and its use, until the company shall proceed according to law, and his action of trespass to recover damages for the injury sustained by the unlawful entry and holding possession, and whatever loss has been caused by these illegal acts.¹

Miscellaneous Matters of Evidence.

154. Plaintiff purchased land after a railroad company had located their line and purchased a right of way along a stream. It was held that plaintiff was not entitled to consequential damages for difficulty in getting his timber from his land to the stream.²

Nor can the jury consider that the owner will be obliged to carry his goods across the railroad and will be inconvenienced by reason of the obstruction of trains.³

The annoyance arising from the necessary use of a railroad is not a nuisance *per se*. The fact that a railroad is a nuisance must be ascertained by a jury before the court will interfere by injunction.⁴

The stealing of fruit by railroad hands cannot be considered as an element of damages.⁵

¹ Justice v. Nesquehoning Valley R. R., 87 Pa. 28 (1873).

² Short v. Rochester & Pittsburgh R. R., 8 Atl. Rep. 596 (1887).

³ Patten v. Northern Cent. Ry. Co., 33 Pa. 426 (1859).

⁴ Bell v. Ohio & Pennsylvania R. R. Co., 25 Pa. 161 (1855).

⁵ Miller v. Railroad Co., 2 C. P. Rep. 11 (1885).

In assessing damages the jurors should not consider probable future legislation.¹

The fact that after the construction of a railroad the post-office was moved to a point nearer to the farm is immaterial.²

The railroad company cannot be charged an excessive rate for timber on the land taken, on the ground that there was not more than was reasonably required for fencing and firewood.³

Mere depreciation in the value of land is not in a legal sense a consequential injury.⁴

Interest as an Element of Damages.

155. The lapse of time from the date of the injury to the date of trial is a proper subject to be considered by the jury in making up their verdict, but it is error to instruct the jury to allow interest *eo nomine* upon the amount of damages they find from the date of the injury. In an action where the court below allowed the jury to award interest, as interest, on damages, the Supreme Court said: "In actions where a definite sum of money is demandable as a debt, interest at the legal rate is a matter of right, and the jury may properly be directed to include it in their verdict; but actions brought to recover unliquidated damages for a wrong, proceed upon a different basis. The nature of the wrong, the attending circumstances, and the time when it was committed, are all for the jury, and may be properly considered in the adjustment of the amount of the verdict. The learned judge said to the jury: 'After you have ascertained that there is any damage, you will allow interest on that sum

¹ *Patten v. Susquehanna R. R.*, 1 Pearson, 48 (1854).

² *Pennsylvania & New York R. R. and Canal Co. v. Bunnell*, 81 Pa. 414 (1876).

³ *Pittsburgh, Bradford & Buffalo Ry. v. McCloskey*, 110 Pa. 436 (1885).

⁴ *Turner v. R. R. Co.*, 8 Phila. 485 (1870).

from May 19, 1885, to the present time.' This would have been an appropriate direction in an action *ex contractu*, because interest is a legal incident of a debt, but it is not justifiable in an action of trespass. We might not have reversed for this alone, but as the case goes back for other reasons, we again call attention to this well-settled distinction between actions resting on contract and those growing out of a tort, so far as interest is concerned. In the former, interest is demandable as interest; in the latter it is not. In the former, the court may properly direct its allowance; in the latter, the question belongs to the jury. It may, or it may not, enter into their calculation of the damages. Whether it shall or not depends on the judgment of the jury in view of all the circumstances of the case. If it is included in the verdict, it is simply as one element of the damages sustained by the plaintiff and liquidated by the verdict."¹

In *Phila., Wilm. & Balto. R. R. v. Gesner*,² a railroad occupied the land of a lunatic for several years, the law authorizing either party to institute proceedings to have the damage ascertained. The committee of the lunatic applied for the appointment of a jury. The jury reported damages in favor of the petitioner and allowed interest for fifteen years on the sum assessed. The court sustained the award, LEWIS, J., saying: "Where the land of a citizen is seized by a corporation, against or without his consent, under an authority coupled with the constitutional obligation to pay a just compensation, the duty of ascer-

¹ *Reading & Pottsville R. R. v. Balthaser*, 126 Pa. 1 (1869).

² 20 Pa. 240 (1853). Interest is not allowed as interest, but it is customary to instruct the jury to increase the damages by an amount equivalent to the interest from the date of the taking: *Pennsylvania, Schuylkill Valley R. R. v. Ziemer*, 124 Pa. 560 (1889); *Gretz v. Philadelphia & Reading R. R.*, 105 Pa. 547 (1884); *Delaware, Lackawanna & Western R. R. v. Burson*, 61 Pa. 369 (1869).

The amount assessed as damages for the taking of land by a railroad is not a penalty: *Del., Lack. & West. R. R. v. Burson*, 61 Pa. 369 (1869).

taining the amount is an incident to the obligation to pay, and clearly falls upon the corporation. Where, as in this case, the injured party is a lunatic, his unfortunate and helpless condition not only accounts for his delay in prosecuting his claim, but gives additional strength to his demand for justice against those who have so long had the use of his property without condescending to pay the slightest regard to his rights. The jury were not in error in allowing interest under such circumstances, and for this reason the court below was right in dismissing the exception in regard to it."

Interest on claims for damages for land is to be computed from the location of the road and not from the date of the bond. ARNOLD, J., said: "In the present case the defendant tendered its bond to the plaintiff in April, 1886, to secure the damages, and commenced negotiations with her to secure a straight line of roadway. Some time was occupied in the negotiation, which failed to produce satisfactory results, whereupon, in February, 1887, the defendant made a detour around the plaintiff's dwelling-house and commenced the construction of its road. On the trial the plaintiff claimed interest from the date of the bond, while the defendant claimed that it was liable only from the time of taking the ground. The jury were instructed that interest should be allowed from the time of taking the plaintiff's property, and that the date of the bond was evidence from which they could find when the land was taken. That the date of the location of the road, and not the date of the bond, is the proper time from which to calculate the interest was decided in *Gilmore v. Pitts., Virg. & C. R. R. Co.*, 104 Pa. 275. In that case the road was located before the bond was given. That the bond was given before the road was located should not make any difference in the rule.

Locating is taking, and on locating its roadway the company becomes responsible for the damage, no matter how long afterward it begins the construction of its road: *Pitts., Virg. & C. R. R. Co. v. Com.*, 101 Pa. 192.”¹

Interest Upon the Award.

156. Interest runs from the award of damages only from the time of filing the award.² A land-owner, in proceedings to assess damages for land taken under the Act of March 27, 1849, is entitled to interest upon the award for the thirty days’ stay of execution allowed by the act.³ Where land is taken by a railroad company the owner of the land is entitled to the interest from the filing of the report of viewers, although final confirmation may be delayed by exceptions.⁴ If an appeal is taken from the award of the jury, interest will only be allowed from the determination or withdrawal of the appeal.⁵

Costs.

157. Costs are not recoverable in a proceeding against a railroad company for land damages, unless given by the statute which provides the remedy.⁶ No costs will be allowed to the owner of lands taken unless damages are awarded and a report confirmed.⁷ The judgment carries with it plaintiff’s witness fees before the jurors.⁸ Petitioners may recover costs for service on the viewers o

¹ *Myers v. Schuylkill River Fast Side R. R.*, 5 Pa. C. C. R. 634 (1888).

² *Hays v. Baltimore & Ohio R. R.*, 3 Pennypacker, 52 (1882).

³ *Leiper v. Baltimore & Ohio R. R.*, 5 Pa. C. C. R. 60 (1888).

⁴ *Pennsylvania R. R. v. Cooper*, 58 Pa. 408 (1868); *Stell’s Case*, 2 Chester C. Rep. 233.

⁵ *Ross v. Railroad Co.*, 14 W. N. C. 143 (1883); s. c. affirmed, 15 W. N. C. 314 (1884).

⁶ *Phila., Ger. & Nor. R. R. Co. v. Johnson*, 2 Wharton, 274 (1836); *Herbein Phila. & Read. R. R. Co.*, 9 Watts, 272 (1840).

⁷ *Shick v. Pennsylvania R. R.*, 1 Pearson, 266 (1868).

⁸ *Leiper v. Baltimore & Ohio R. R.*, 3 Delaware County, 373 (1888).

notice of their appointment, and for mileage in such service; also for serving subpoenas on their witnesses and mileage, and for the attendance of their witnesses and their mileage.¹ A land-owner is entitled, under the Act of 1849, to the costs of subpoenas and the fees of witnesses who attended and were examined before the viewers, with mileage.² The expenses of making a survey and preparing a draft of the premises injured by railroad company are a part of the costs.³

Viewers appointed under the Act of February 19, 1849, to assess damages done by reason of the location, construction, and operation of a railroad are entitled to \$1.50 for each day necessarily employed in the performance of their duties. The act making no provision for mileage, and none can be allowed.⁴ A viewer who acts upon several petitions at the same time is entitled to the *per diem* allowance for only one case.⁵

Where the first report of the viewers in proceedings to assess damages under the Act of March 29, 1848, for land taken by the Pennsylvania Railroad Company, awarding damages to the plaintiffs, is set aside as defective, and plaintiff applies for and obtains an *alias* view by which a larger amount of damage is awarded, the defendant is liable for the costs of both views. Items in the bill of costs claiming mileage for the viewers in addition to \$2 per day, charges for serving notices on viewers, and the prothonotary's charge of probate and tax, are proper and will not be stricken out.⁶

¹ *Pennsylvania R. R. Co. v. Keiffer*, 22 Pa. 356 (1853).

² *Leiper v. Baltimore & Ohio R. R.*, 5 Pa. C. C. R. 60 (1888).

³ *Seiber v. Lancaster & Reading Narrow Gauge R. R.*, 2 Leg. Chron. Rep. 59 (1874).

⁴ *Wallace v. Pittsburgh & Lake Erie R. R.*, 6 Pa. C. C. R. 400 (1889); *De Long v. Allentown R. R.*, 1 Woodward, 195 (1864).

⁵ *Blackfan v. Pennsylvania R. R.*, 11 W. N. C. 155 (1881).

⁶ *McGovern v. Pennsylvania R. R.*, 8 Lancaster L. Rev. 59 (1890).

A tender of money to the owner of land for damages sustained for right of way, need not be brought into court, or pleaded, if not accepted; and on trial if the owner of land recovers less than the amount tendered, he takes his damages without costs.¹

Witnesses.

158. To ascertain the market value before and after taking the land, the opinion of witnesses may be received. In *East Pennsylvania Railroad Co. v. Hottestein*, THOMPSON, J., said: "To ascertain this, the opinion of the witnesses must necessarily be resorted to. I do not say this is the exclusive test, but I know of no other that would so well embrace easy consideration, both of appreciation and depreciation, if the testimony be from men of candor and judgment."²

Expert Witness not Necessary.

159. Expert testimony is not necessary to determine the value of city property injured by railroad. Any person familiar with the value of the property is a competent witness. The value of the opinion of such a witness will depend on the extent of his familiarity with the surrounding property and the prices asked, and paid for it; but this is for the jury to determine.³

¹ *Winebiddle v. Pennsylvania R. R.*, 2 Grant, 32 (1852).

² 47 Pa. 28 (1864). See *Pennsylvania R. R. v. Keiffer*, 22 Pa. 356.

³ *Jones v. Erie & Wyoming Valley R. R.*, 151 Pa. 30 (1892).

The market value of land is not a question of science and skill, upon which only an expert can give an opinion. Persons living in the neighborhood may be presumed to have a sufficient knowledge of the market value of property with the location and character of the land in question. Whether their opinion has any proper ground to rest upon, or is mere conjecture can be brought out in cross-examination: *Pennsylvania & New York R. R. and Canal Co. v. Bunell*, 81 Pa. 414 (1876).

A witness who has knowledge of the land though not a real estate expert, may

Qualification of Witness.

160. The estimate which a witness may make, is an opinion formed from actual personal knowledge of facts affecting the subject-matter of inquiry, and, as a conclusion of fact, is admissible in evidence, from necessity, as the best evidence of which such a question is ordinarily susceptible. In order, therefore, that a witness may be competent to testify intelligently as to the market value of land, he should have some special opportunity for observation, he should, in a general way, and to a reasonable extent, have in his mind the data from which a proper estimate of value ought to be made; if interrogated, he should be able to disclose sufficient actual knowledge of the subject to indicate that he is in condition to know what he proposes to state, and to enable the jury to judge of the probable proximate accuracy of his conclusions. He may hesitate in making an estimate of the value, he may say that he does not know certainly, but, after due deliberation, may be able to express an opinion, or come to a conclusion, the accuracy of which, under all the evidence, is of course wholly for the jury.¹

The specific elements of computation may be given in evidence. Thus a witness may be permitted to testify what the land on which the railroad is constructed is worth, without asking him what the whole tract was worth.²

The opinion of witnesses as to what the value of the property may be after the road is completed is inadmissible; but after the completion of the road a witness may

be asked whether the value of the land is increased or diminished by the construction of the railroad: *Beck v. Penna., Poughkeepsie & Boston R. R.*, 148 Pa. 271 (1892).

¹ *Pittsburgh, Virginia & Charleston Ry. v. Vance*, 115 Pa. 325 (1887).

² *Danville, Hazleton & Wilkes-Barre Railroad Co. v. Gerhart*, 32 P. F. Smith, 260 (1875).

be allowed to express an opinion as to the value of ~~the~~ land as affected by the direct and necessary consequences of the construction of the road. In *Watson v. Pittsburgh & Connellsville R. R.*,¹ STRONG, J., said: "His offers all had the same fault. They proposed to submit to the jury the conjecture of the witnesses as to what the plaintiff's lands would be worth, or what their market value would be at some unknown future time, when the railroad shall have been constructed. Such testimony does not rise even to the standard of an opinion. It is a mere guess, with no substantial foundation upon which to rest. When damages are assessed, after the completion of a railroad, it is possible to prove, with some reliable certainty, the difference in the market value of the land through which it passes, caused by its construction. Then the value at the time of the entry on the land is known, and so is its value as affected by the improvement. In a certain sense, indeed, an estimate of the present or past value is an opinion, but it has a measure which insures proximate accuracy. An estimate of what property will be worth at a future day, or in an altered condition, is entirely without guide or measure and must be wholly fanciful. And the proffered evidence was objectionable for other reasons. It proposed to prove that, by reason of the entry on the land and occupation of a part, and by reason of the railroad, the property would be depreciated in value, without confining the witnesses to a consideration of the direct and necessary consequences of such occupation. It left them at liberty to take into their estimate any consequences, no matter how remote, without regard to the question whether they were such damages as the law allows to be compensated. This ought not to have been permitted."

¹ 37 Pa. 469 (1860).

What Witnesses Are Competent.

161. A farmer who lived in the neighborhood of land taken by a railroad company, and had known it for forty years, who had constantly seen it in passing and repassing upon the public road, and had been upon and at the buildings, and knew the general selling price of land in the neighborhood, is a competent witness to give an opinion as to the value of the land.¹

One who has acted as a viewer in the case and has a general knowledge of land in the neighborhood is competent.²

On an appeal from an assessment of damages, a viewer may be examined as a witness, but he should be instructed that he must speak from his own knowledge, and not give an opinion founded on evidence which he had heard as a viewer.³

A witness who has no other knowledge of the value of lands in the neighborhood, than what was based upon a few purchases made by the railroad company itself, is competent. He has some knowledge upon which to base an opinion, and the value of that opinion is for the jury.⁴

What Witnesses are Incompetent.

162. A sewing-machine agent who did not reside in the vicinity of the land that was condemned, but had made efforts to sell a neighboring property, but was without other means of knowledge as to land values in the neighborhood is an incompetent witness as to the value of the land condemned.⁵

¹ *Curtin v. Nittany Valley R. R.*, 135 Pa. 20 (1890).

² *Gorgas v. Philadelphia, Harrisburg & Pittsburgh Ry.*, 141 Pa. 1 (1891).

³ *Dorlan v. East Brandywine and Waynesburg Railroad Co.*, 46 Pa. 520 (1864); *Harrisburg & Potomac R. R. v. Stayman*, 2 W. N. C. 103 (1875); *Philadelphia & Trenton R. R. v. Rogers*, 2 Walker, 275 (1884).

⁴ *Pittsburgh & Lake Erie R. R. v. Robinson*, 95 Pa. 426 (1880).

⁵ *Schuylkill River & East Side R. R. v. Stocker*, 128 Pa. 233 (1889).

A witness who was only acquainted with a part of the land taken and knew nothing of the other part, is incompetent to testify as to the value of the whole tract.¹

Persons who own similar land in the neighborhood, and experts who have dealt in the same kind of property, are competent to testify as to its value. Persons who have merely dealt in city lots and not in lands in the vicinity of the plaintiff's property are incompetent.²

Cross-Examination.

163. On cross-examination, a witness may be asked as to particular sales of properties in the neighborhood, in order to test his information as to values.³

¹ *Schuylkill River East Side R. R. v. Stocker*, 128 Pa. 233 (1889); *Pittsburgh etc., and Railway Co. v. Vance*, 115 Pa. 325.

² *Myers v. Schuylkill River East Side R. R.*, 5 Pa. C. C. R. 634 (1888).

³ *Traut v. New York, Chicago & St. Louis R. R.*, 1 Mona. 394 (1888).

CHAPTER X.

LOCATION OF RAILROADS.

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| 164. What Constitutes a Location. | 172. Change of Location. |
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What Constitutes a Location.

164. The act of location of a railroad is the adoption of a line by the board of directors, and is not the mere experimental line of an engineer.¹

The location of a railroad, so as to give title to one company as against another, requires some action on the part of the company establishing and adopting a definite route. A mere location by an engineer, surveying and marking a line, is not sufficient. In a recent case where there was a contest between two railroad companies, over a right of way, it appeared that the chief engineer of one company surveyed and staked out a centre line of a proposed railroad, and returned a map thereof to the office of the company, but no action was taken by the board of directors adopting the location. It was held that the act of the engineer gave no title to the company as against a

¹ *Hagner v. Pennsylvania Schuylkill Valley R. R.*, 154 Pa. 475 (1893).

rival corporation. WILLIAMS, J., said: "That a corporation cannot exercise the power to appropriate land until it has located its line is well settled. Thus, if a company has an option between two or more lines or routes, it must make its election by an actual adoption of one of them before it can acquire title by appropriation upon either: 1 Redf. on Railways, 240. The reason for this is that the act of location is at the same time the act of appropriation. The space covered by the line as located is thereby seized and appropriated to the purposes of the construction and operation of the railroad by virtue of the power of eminent domain, and nothing remains to be done except to compensate the owner. After the act of location by the company, the owner or the company may proceed at once to secure an ascertainment of damages. Until such act neither can do so; for no right to damages vests in or accrues to the owner until there has been an appropriation of his property by the corporation: *Davis v. Railroad Co.*, 114 Pa. 308. There should be no unnecessary delay in completing the preliminary exploration and making a location, if priority is to be secured. In *New Brighton, etc., R. R. Co.'s Ap.*, 105 Pa. 13, private parties, in contemplation of securing a charter, caused a preliminary survey to be made over a route for a railroad projected by them. They afterward secured a charter, and the corporation adopted the line of the preliminary survey as the location of its road. In the meantime, another corporation had made a preliminary survey over the same ground, and made a final location of its road. It was held that the latter company had the better title, and that the adoption of the former company of the line run before its incorporation could not carry its title back to the date of the preliminary survey.

"The application of the rule now laid down, as to what

constitutes a valid location, to the case before us disposes of this appeal. The plaintiff company has the right, under its charter and subsequent legislation, to build its road from its present terminus at Hall's to Williamsport, and connect with the Philadelphia & Erie Railroad. In 1886, and again a year or more before the bill was filed in this case, the engineer of the plaintiff ran over a route from Hall's to Williamsport, connecting with the road of the Philadelphia & Erie Company near the lot described in the bill as the Metzger lot, and set stakes along it. It does not appear in the bill or in the evidence that this preliminary survey was ever reported to the plaintiff company, or that any action was ever taken by the company to fix the location of its road between Hall's and the intersection with the Philadelphia & Erie in Williamsport. In the meantime, the latter company, in locating a branch of its road, had run and adopted a line crossing one corner of the Metzger lot, over which the plaintiff claimed to have made a location by the act of its engineer, and was proceeding to have an assessment of the damages made in the manner provided by law, when this bill was filed and an injunction obtained in the court below restraining the defendant from proceeding further in its effort to perfect its title to the location made for its branch over the Metzger lot. The answer denied the plaintiff's title in these words: 'The defendant denies that the said plaintiff ever made a valid and legal location of the line of its railroad upon the lot of the said John Metzger.' The plaintiff was thus called upon to show the fact of the location of its road upon the land, or upon some part of the land, which the defendant claimed the right to occupy under its location of its branch. It did not show, or make any effort to show, the location of the line of its road. When this want of title in the plaintiff

was urged upon the attention of the learned judge of the court below, he seemed to recognize its importance as a general proposition, but to think that it was rendered of no consequence in this case by the state of the pleadings. He said: 'It is urged by the defendant that there is no evidence that the directors of the plaintiff ever authorized the location of this road. It might be sufficient answer to this allegation to say that there was no such issue raised by the pleadings.' But we have seen that it was distinctly raised. The learned master found that the plaintiff's road had been located by an engineer. He did not find that the company had ever taken any action whatever, either before or after the engineer ran over the route. He could not, from the evidence. An engineer may make explorations in advance of a location, or he may re-mark the line or adjust the grades after the adoption of a location, but an engineer alone cannot locate a railroad so as to give title to the company that employs him. He is not the company. The right of eminent domain does not reside in him."¹

The act of location of a railroad is at the same time the act of appropriation. The space covered by the line as located is thereby seized and appropriated to the purposes of the construction and operation of the railroad by virtue of the power of eminent domain, and nothing remains to be done except to compensate the owner.²

¹ Williamsport & North Branch R. R. v. Philadelphia & Erie R. R., 141 Pa. 407 (1891); Titusville & Petroleum Centre R. R. v. Warren & Venango R. R., 12 Phila. 642 (1872); *In re* Connecting Railroad, 1 Leg. Gaz. 22 (1870); Davis v. Titusville & Oil City Ry. Co., 114 Pa. 303 (1886); Wilkes-Barre & Philadelphia R. R. v. Danville & Hazleton R. R., 29 Leg. Int. 373; West End Pass. Ry. v. Phila. City Pass. Ry., 30 Leg. Int. 257; New Brighton & New Castle R. R. Co.'s Ap., 105 Pa. 13.

² Hagner v. Pennsylvania Schuylkill Valley R. R., 154 Pa. 475 (1893); Delaware & Hudson Canal Co. v. Scranton & Forest City H. R., 1 Lack. Jurist, 97 (1889).

An unauthorized preliminary survey, though well marked by a line of stakes indicating the location of a railroad, cannot be regarded as sufficient notice of a prior legal appropriation of the land. The marks upon the ground would of course suggest the purpose for which they were made, and thus impose the duty of inquiring when and by whom they were placed there, but the due prosecution of that inquiry would disclose the fact that the survey was made by persons who had no authority to locate and construct a railroad on the route, and before any company was incorporated for the purpose. There the duty of inquiry would end, and the company first on the ground would have an undoubted right to consider it unoccupied for railroad purposes, and to proceed with its survey and location.¹

The location of a railroad by survey is a taking and appropriation of the land although the actual construction of the road is not begun until years afterward.²

Location must be by an Incorporated Company.

165. The location of a railroad in Pennsylvania must be by an incorporated company. The company is created for a purpose that is essentially public; and to that end it is clothed with the right of eminent domain, which is never delegated by the commonwealth to unincorporated associations or private individuals.³

Location by Promoters.

166. The location of a railroad by its promoters before incorporation is invalid. The road can only be located

¹ *New Brighton & New Castle R. R. v. Pittsburgh, Youngstown & Chicago R. R.*, 105 Pa. 13 (1884).

² *Pittsburgh, Virginia & Charleston Ry. v. Com.*, 101 Pa. 192 (1882).

³ *New Brighton & New Castle R. R. v. Pittsburgh, Youngstown & Chicago R. R.*, 105 Pa. 13 (1884).

by the president and directors of an incorporated company, or by their engineers or employees. The adoption by resolution merely of such an unauthorized survey and location does not give the company adopting it any right thereto as against another company which, subsequently, not only adopts a similar survey and location covering part of the same ground, but also takes actual possession, retraces and marks the line as its own before the other company has done anything more than passed and entered on its minutes the resolution of adoption.¹

Discretion as to Location.

167. The managers of a railroad are given a discretionary power to locate the line of their road, and when this discretion is exercised within the limits of the act of incorporation, the courts have no right to interfere. A railroad twenty-four miles long was authorized "from a point on the Pennsylvania Railroad at or near Parkesburg." It was held that a connection one mile and one-half east of Parkesburg was not a transgression of the act. "There is no testimony in the case to controvert the propriety of the location made near Pomeroy station on the Pennsylvania Central, a mile and a half east of Parkesburg, in an engineering point of view, or that it is not proper in view of the route indicated in the Act of Assembly, or that it is not for the best interest of the company. The facts found by the master seem to establish all these in favor of the company. But it is thought that the location should have been at Parkesburg. But this is not what the legislature said, nor are we able to discern any controlling policy in requiring it to go there. The object in incorporating the company to construct the road was 10

¹ *New Brighton & New Castle R. R. v. Pittsburgh, Youngstown & Chicago R.*, 105 Pa. 13 (1884).

furnish an outlet to the trade of the flourishing valleys through which it was to run, and give them a connection with the Pennsylvania Central, which will furnish an outlet east and west to that section of the country. The connection with that line of road was the great point; the place was subordinate, as the discretion given shows. As Buck Run crosses that road east of Parkesburg some half a mile or more, and as the line of the road was to follow down its valley, the designation in the charter 'at or near Parkesburg,' was with reference to the route of the road from its intersection with the Pennsylvania road, rather than anything else. This was undoubtedly the reason of the indefinite terminus in the act, and the discretion allowed in fixing it. We think that a mile and a half was not transgressive of the discretion allowed *per se*, and no fact has been proved to show any willful abuse of the discretion exercised. As Parkesburg was not fixed as a point or terminus, it would require something very conclusive of impropriety, or mistake in the location to induce a court to control the company and compel it to extend its track a mile and a half, side by side, with the Pennsylvania road to Parkesburg, encountering heavy expenses in the construction as well as in procuring the right of way. We need not dwell on these considerations. The company had a discretion to locate the terminus of its road elsewhere than at Parkesburg, and while they did so geographically near that place, and there is nothing to show anything wrong in fact or law, we have no right to interfere. With their discretion exercised within the limits of their act of incorporation, no court has any control or right to interfere."¹

¹ Parke's Ap., 64 Pa. 137 (1870), Per THOMPSON, C. J.

In *Com. v. Erie & North East R. R. Co.*, where objection was made to the location of a railroad, BLACK, C. J., said: "That a company which is authorized to make a road from any part of a borough may make it from one part as well as

The discretion of a railroad company in locating the route of the railroad cannot be inquired into by the courts. Thus, where a railroad company located its road on the main street of a town, evidence that it could have laid its tracks upon another route is inadmissible.¹

The directors of a railroad company will not be restrained by injunction as to the location of their road, unless it is shown that they have capriciously or wantonly disregarded the rights of others.²

If a railroad has power to widen its roadway "when- ever, in the opinion of the board of directors, the same may be necessary to secure the safety of persons or prop- erty, and increase the facilities and capacity of transpor- tation and traffic thereon," the question of the time and mode of widening is one exclusively for the board of di- rectors, and not subject to review by the court, except when exercised corruptly or capriciously.³

Under the Act of May 25, 1832, the petitioner had the sole right to locate the road, but the viewers, or, in case of appeal, the court and jury could pass upon its necessity.

In *Hays v. Resher*,⁴ *WOODWARD, J.*, said: "The question whether the route adopted by the petitioner was necessary and useful was in the case, but whether a shorter, cheaper, or more convenient route could be found was not in the case, except as that question may have involved these inquiries-

"The petitioner had every motive for adopting the

another is so mere a truism that one hesitates to utter it. The discretionary right of fixing the terminus at a definite point within the limits assigned is vested by the organism of this company in the directors. We have it not. We cannot re- solve ourselves into a board of directors, nor can we delegate the authority of such a board to the attorney-general and his assis'ant counselors." 27 Pa. 339 (1856). See, also, *New York & Erie R. R. v. Young*, 33 Pa. 175 (1859).

¹ *Struthers v. Dunkirk, Warren & Pittsburgh Ry. Co.*, 87 Pa. 282 (1878).

² *Anspach v. Mahanoy & Broad Mountain R. R.*, 5 Phila. 491 (1864).

³ *Lodge v. Railroad Co.*, 1 Leg. Gaz. Rep. 131 (1871).

⁴ 32 Pa. 169 (1850).

best route, for the whole expense of construction, as well as the damages of the defendant, were to be borne by him. It was the policy of the enactment to intrust this question to his instincts of self-interest, setting over him such guards, however, as would compel him to repair all damages he might occasion.

"If the statute had not referred the location to the petitioner, if it had left it open for viewers and jurors, it would have accomplished none of its purposes. It was designed to enable citizens to bring out their minerals and manufactures for transportation on the public works which the State had been at great cost to build. It was a mode, indeed, of pushing the public improvements up to every man's door who was situated within three miles of any of the great lines. Each man was to do the work for himself, under the jealous eyes of the court, and subject to damages for injuries, but on a plan of his own. If a jury were to plan the work, it would never be done. Supposing unanimity among them, which would not be very likely, he who was to execute would insist on guiding his own hand. Men do not commonly call in juries to project improvements of their estates, and the statute imposed no such necessity."

Termini.

168. An Act of Assembly authorized a railroad company to construct a railroad "to connect with any railroad constructed or to be constructed at any point on the northern boundary of Erie or Warren County." The court held that the company had power to terminate its road at any point in the boundary which it might choose, and was not bound to build to the terminus or line of another railroad.¹

¹*Com. v. Cross-Cut R. R. Co.*, 53 Pa. 62 (1866).

If an act authorizes a railroad company to extend its road to "any point on the waters of the Youghiogheny, and within the limits of this commonwealth," and it appears that the waters of the Youghiogheny extend to the boundary line between the States of Pennsylvania and Maryland, the railroad company has a right to connect its road with a railroad in Maryland.¹

If a railroad company is authorized by its charter to build its road from a city to another point, it may build its road from any point within the city.²

A railroad company was authorized to construct its railroad from a city. The company obtained permission from the city to build its road along a river bank to a certain street. It subsequently bought a lot upon this street on the opposite side of an avenue running along the river from that on which its tracks were constructed. The greater part of this lot was occupied by a board-yard which was allowed to remain. Upon the rest of the lot was an old frame building which the company fitted up for a passenger station and for offices. Near by they erected a small frame shed for freight. A single track connected this shed with the main track upon the opposite side of the avenue, and it appeared that the greater part of the freight business was done elsewhere. It was decided that the company had not exhausted its power to locate and establish a terminus, and that it was competent for it subsequently to establish a terminus at another point within the limits of the city.³

A railroad company's charter authorized the road to be built from the borough of Erie, then bounded on the south by Twelfth Street. Subsequently the borough was

¹ *Com. v. Pittsburgh & Connellsville R. R.*, 58 Pa. 26 (1868).

² *Western Pennsylvania R. R. Co.'s Ap.*, 99 Pa. 155 (1881).

³ *Western Pennsylvania R. R. Co.'s Ap.*, 99 Pa. 155 (1881).

extended farther south. After this extension the railroad company built its road from a point within the enlarged borough, but sixty rods south of the borough line as it was at the date of the charter. The court held that this was not a compliance with the charter. BLACK, C. J., said: "The act of incorporation authorizes the defendants to build a railroad 'from the borough of Erie to some point on the east boundary of the township of North East.' The defendants' counsel insist that the word 'from' should be taken inclusively, and that a road from any part of the borough to the proposed terminus *ad quem* is a compliance with the law. On the other hand, the counsel for the plaintiff insist that it must begin at the borough line, and not elsewhere. Our opinion is with the defendants on this point, but we think the argument on it was rather beside the purpose, since the terminus of the railroad is neither at the line of the borough nor inside of it. Coming from the east it passes the east boundary of the borough at a distance of sixty rods south and runs on about ——— rods further in a direction precisely parallel with the south line of the borough and there stops or connects with the road built by the Franklin Canal Company to the Ohio line. Certainly this is not a literal compliance with the act of incorporation. Making a road from a point selected by the defendants themselves sixty rods south of the borough, not coming within that distance of the borough at any place, is not making a road from the borough eastward. Is there anything in the peculiar circumstances of this case which will justify us in treating this infraction of the law otherwise than as we treat similar violations of duty when committed by companies? We shall see.

"What I have said concerning the borough of Erie refers to what it was when the act of incorporation was

passed. In 1848 and before the defendants' work was made, its limits were extended so as to include the place where the terminus of the railroad had been fixed. At a still later period the borough was incorporated as a city. But we are very clear that this alteration of the borough lines did not in the least change the rights or obligations of the railroad company. All laws must be executed according to the sense and meaning which they imported at the time of their passage. A line which did not exist until 1884 could not have been in the mind of the legislature in 1842. The modifications made in the charter of the borough left the defendants' charter just where it was before. The amendment of one is not to be taken as a supplement to the other. If the east boundary line of North East Township had been shortened or obliterated, or differently named by an Act of Assembly passed in 1848, the defendants would have understood very well that their right to locate the eastern terminus on any part of the township line as it existed in 1842 was not thereby altered or taken away. The law commanded the defendants to begin their railroad at the borough of Erie as it was then, and that command is in full force, notwithstanding the change which has been made in other matters.

"Is this violation of the charter, so trifling that we can overlook it on the principle of *de minimis*? The counsel of the company have not argued that it is—and certainly it is not. The place at which the terminus should be established being precisely and particularly designated by the act of incorporation, in words which render mistake impossible, all other places, whether near or far, are as surely excluded as if they had been expressly forbidden. If we cannot hold companies to a strict compliance with their charters, we cannot hold them at all. In some situations (and, for aught we can see, this may be one of them)

the purpose and object of allowing the road to be built can be as completely defeated by a deviation of sixty rods as sixty miles. The directors must have thought that they could gain a point of great value to them by changing their terminus, or else they certainly would not have ventured upon it in the teeth of the law; and they must have been conscious, too, that the legislature had some important reason for confining them to the borough, or else they would have sought and got an amendment to their charter."¹

Boundaries of Right of Way.

169. The lines of a street on which a railroad company locates the centre line of its road and lays its tracks are not necessarily, nor presumed to be, the boundaries of its right of way. These may be within, beyond, or upon lines of the street; but, in either case, it is the duty of the company to designate them by some appropriate and decisive act. A company which refuses, when requested by the lot-owner, to define its right of way by marking the outside lines, may be expected, when its necessities or interests require it, to claim an appropriation of the full width of sixty feet.²

A railroad company, authorized to take for its right of way a strip of land "not exceeding sixty feet wide," may limit the width of its appropriation to less than sixty feet; but, unless such limitation affirmatively appears, it will be presumed that it has appropriated the full width allowed by its charter.³

Plaintiff was the owner of a lot, with two dwelling-houses thereon, situate at the corner of Washington

¹ *Commonwealth v. Erie & North East R. R.*, 27 Pa. 339 (1856).

² *Jones v. Erie & Wyoming Valley R. R.*, 144 Pa. 629 (1892).

³ *Jones v. Erie & Wyoming Valley R. R.*, 144 Pa. 629 (1892); *Lodge v. Railroad Co.*, 1 Leg. Gaz. Rep. 131 (1871).

Avenue and New Street in the city of Scranton. In 1886 the Erie & Wyoming Valley Railroad Company extended its line of railway into said city, by a route which passed directly over the intersection of Washington Avenue and New Street, at the point where plaintiff's lot was located. The centre line of the route was twenty-five feet from the corner of his lot, and the tracks of the railroad was eighteen feet above the street grade, supported by a bridge eighteen feet wide, which the company had erected there. The centre of the bridge was the centre line of the railroad, and that portion of the bridge which was nearest to plaintiff's lot was about sixteen feet from it. The plaintiff alleged that the company had located its road upon his land, and obtained a view under the Act of February 19, 1849, P. L. 79, to assess the damages. The viewers declined to award damages, on the ground that the company had not taken any of his land, and that it had not in the construction of its road on the street in front of his lot, made any excavation or embankment. On appeal from their report, an issue was framed and a trial was had, which, by direction of the court, resulted in a verdict for the company.

The plaintiff testified that when the company's engineers were engaged in locating its road in the vicinity of his property "they staked out the lines, drove a stake in the centre, and measured thirty feet each way;" that they drove "a tack or shingle nail" in his fence, and one in the wooden curb, near to it; and that Jenks, who was in charge of the work, told him that these marked the outside lines of the railroad. He also submitted evidence that the company, on the line of its road above and below his lot, was in the actual occupancy of a strip of land sixty feet wide. In answer to this showing by the plaintiff, Jenks admitted that he was upon the lot, and drove

the nails as claimed, but denied that he located an outside line there, or made any representations that the nails were driven to mark such a line; and that he explained that the sole purpose of his presence and work there was to get "preliminary notes" to enable him to locate a curve line which was required near that point. He testified further, that the only line of the road located near the plaintiff's lot was the centre line; that the company purchased and occupied for railroad purposes some lots in that vicinity, the lines of which were marked, and that the only point on the road where the right of way was staked out of the width of sixty feet was on another property. It was held that the presumption that the company had taken the full width of right of way which it was authorized to take had not been overcome by the evidence, and that the judgment should be reversed.¹

Where a railroad company constructs an embankment showing definitely the limits of its right of way, a stranger cannot, by erecting a building within the limits of the right of way, obtain title by adverse use against the railroad company.²

A railroad company cannot be indicted for building a fence along its right of way so as to inclose some ground within the lines of a plotted street, where it appears that the street had not actually been laid out, and the public had not acquired a right to use the ground by continued adverse use. In such a case, the commonwealth's evidence tended to show the location and building of the railroad through an open country, and the gradual extension of building and population on both sides of the

¹ *Jones v. Erie & Wyoming Valley R. R.*, 144 Pa. 629 (1892).

² *Kelley v. Philadelphia & Reading R. R.*, 5 Montgomery County Rep. 29 (1889).

line; the use by the people of the railroad tracks, in the manner customary on vacant lots alongside of tracks, for passage in any direction, as on an open common, and the acquiescence of the railroad company in such use, without any concession of their own rights, until such use became a burden, and they determined it by the fence complained of. The court held that such acquiescence neither lost any rights to the company nor gained any for the public.¹

Occupation of River Valley or Bed of River.

170. A railroad company may be authorized to build a railroad in a particular river valley if another company previously authorized to occupy the valley fails to build its railroad.

In *Packer v. Sunbury & Erie R. R.*,² the Act of March 27, 1852, relating to the Sunbury & Erie R. R. Co. provided as follows: "That the said company shall have power to construct lateral and branch roads from the line of their road southward or eastward from Williamsport, to intersect any other railroad, by means of which the said company may be enabled to form connections with the city of Philadelphia by way of the valley of the Schuylkill, or, as hereinafter provided, by the way of the valley of the Susquehanna; *Provided*, That on any road that may be made between Sunbury and Harrisburg, the same tax be and is hereby imposed as is now or may hereafter be imposed by law on the Susquehanna Railroad. *And provided further*, That if the Susquehanna Railroad Company shall fail to build that portion of the line of their road under contract between Bridgeport and Sunbury within one year from the passage of this act, and

¹ *Commonwealth v. Philadelphia & Reading R. R.*, 135 Pa. 256 (1890).

² 19 Pa. 211 (1852).

complete the same within two years thereafter, then, and in that case, the Sunbury & Erie Railroad Company is hereby authorized to extend their road from Sunbury by the valley of the Susquehanna to connect with the Pennsylvania Railroad at such point as may be deemed most expedient by the said company on the same terms and conditions that they are now authorized to construct the main line of their road between Sunbury and Erie."

The court in construing the act said: "It is very improbable that the legislature intended these two companies to make two roads over the same ground. The right of the Susquehanna Company is plainly granted and is not denied. The supplement to the Sunbury & Erie Company must be construed strictly, not only because that is the rule for all public grants, but because this particular grant cannot be supposed to have been intended. But while the strictest construction is the only proper one, no interpretation could be latitudinarian or loose enough to give it the meaning which the defendants insist upon. The Susquehanna Company has the right to make the road, provided they commence and finish it within the time limited by law; and the Sunbury & Erie Company have no authority given them for that purpose unless the other company shall fail."

Where a railroad company is authorized to build its road through a valley, and a borough extends across the whole width of the valley, the company may build its road through any street of the borough which it chooses.¹

A railroad company has the right, in the reasonable exercise of its franchises, to build a road longitudinally in the bed of a navigable river. WEAND, J., said: "If the same power to build a main line involves the right to

¹ *Cleveland & Pittsburgh R. R. v. Speer*, 56 Pa. 325 (1867).

build branches and sidings to carry out the purposes of the charter, we think the same consequences would follow, and that in such cases all might be done as could be done in the construction of the main line; and if the right to occupy exists it can be longitudinally as well as at right angles or other, for, as in this case, it might be the only practicable manner of building a branch without doing great injury to others. In this respect we can perceive no difference between occupying a river and a public street; both are highways."¹

Provision for Future Needs.

171. A railroad has a right, in condemning land, to regard and make provisions for its future as well as its present needs, and non-user of a portion of the land for certain purposes cannot be held to be abandonment.²

The widening of a railroad so as to make the road-bed sufficient for four tracks, when only two are to be immediately laid, but the others will probably, in the estimation of the company, be needed, is not an unreasonable exercise of the power given by the Act of March 17, 1869, to a railroad company to widen its road-bed.³

The Act of April 2, 1831, incorporating the Phila., Del. County, etc., R. R. Co., authorized the company, "as soon as they conveniently can, to locate and construct a railroad of one or more tracks," and "to make, construct, and erect such warehouses, toll-houses, carriages, cars, and all the works and appendages necessary for the convenience of the said company for the use of said rail-

¹ *Schofield v. Pennsylvania Schuylkill Valley R. R. Co.*, 12 Pa. C. C. R. 122 (1890).

² *Pittsburgh, Ft. Wayne & Chicago Ry. v. Peet*, 152 Pa. 488 (1893); *Lodge v. Philadelphia, Wilmington & Baltimore R. R.*, 8 Phila. 345 (1871).

³ *Lodge v. Railroad Co.*, 1 Leg. Gaz. Rep. 131 (1871); *Simpson v. Philadelphia & Reading R. R.*, 4 Montgomery Co. R. 102 (1888).

ad." The act was construed to authorize the company to build switches, sidings, and turn-outs. It was also held that the company was not bound to exercise its whole authority at the very beginning, when its business was small, but could construct sidings and turn-outs as its business increased.¹

A turnpike acquired by purchase by a railroad company, but not used for railroad purposes, but intended to be used, may be freed from tolls and opened to public travel by judicial proceedings until the railroad company chooses to exercise its right to lay down its tracks.²

Change of Location.

172. A railroad company may, before the construction of its road, and before damages are assessed, change the location. If changes in location cannot be made when proper railroad construction demands them, the public must suffer as well as the corporation. Mistakes will happen in engineering as well as in other work, and such mistakes may not be discovered until after the location of the road. While the location continues, the owner, by reason of the appropriation of his land, may sustain some damages. These should be paid; and, when they are paid, no one is injured by a change of location made in good faith.³

Where a railroad company is authorized by its charter to enter upon any land which it shall deem necessary for laying its road, it may alter a location of the road once made, even after an award of damages. The court said: "If the company should persist in capriciously changing their location so as to injure the title to lands once entered

¹ Phila. & Balt. R. R. v. Williams, 54 Pa. 103 (1867).

² Philadelphia, Newtown & New York R. R. v. Snyder, 120 Pa. 90 (1888).

³ Hagner v. Pennsylvania Schuylkill Valley R. R., 154 Pa. 475 (1893).

upon, such proceedings might be the subject of redress, at the suit of those so injured.¹

Previous to the Act of April 11, 1862, a railroad company having once selected the location of their road could not change it against the consent of the owner of the land, for the exercise of eminent domain being derogatory to private right, the authority must be strictly construed. But the company might change with the consent of the land-owner.²

The location of the road by the company is an appropriation of the land, and after the assessment of the damages, the company cannot, by a change of route, relieve itself from the payment of damages assessed.³

A land-owner who accepts from a railroad company the award of damages made by a jury appointed at his own request, cannot afterward maintain a bill in equity to compel the railroad company to cross his land in some other manner than that originally proposed by the company.⁴

A railroad company in consideration of a right of way over mining land covenanted with the owner of the lands that upon notice it would change its location, or permit the coal underneath to be mined. It was held that a tenant of the owner whose lease gave him the right to mine all the coal might sue in the name of landlord for breach of the covenant.⁵

If a railroad company having a right of way over mining land under a covenant with the owner to change

¹ *Roberts v. Philadelphia, Germantown & Norristown R. R.*, 5 Clark, 124 (1851); 1 Phila. 262 (1851).

² *Verner v. Mine Hill & Schuylkill Haven R. R.*, 2 Leg. Chron. Rep. 310 (1875).

³ *Beale v. Pennsylvania R. R. Co.*, 86 Pa. 509 (1878).

⁴ *Campbell v. Pennsylvania Schuylkill Valley R. R.*, 2 Montgomery County L. Rep. 139 (1886).

⁵ *Mine Hill & Schuylkill Haven R. R. Co. v. Lippincott*, 86 Pa. 468 (1878).

its location upon notice, refuses to perform the covenant, the measure of damages is the value of the coal which was left standing so as not to let down the surface. Such a covenant, however, cannot be specifically enforced. Since the contract also involved the rights of the public, the refusal of the company to change the location converted the right of the land-owners into a right for damages under the covenant.¹

Branches.

173. A branch is a section of a railroad, which may be an off-shoot from the main road, or a direct extension from the terminus. The necessity for a branch, and its direction, rests entirely in the will and discretion of the president and directors of the company by which it is to be constructed.²

The definition of a branch railroad does not depend on either length or direction. Thus a company chartered to build a road "about three miles long" may in its discretion build a branch six miles long. In *Vollmer v. Schuylkill River East Side R. R. Co.*, ALLISON, J., said: "The power of railroad companies under an authority to construct branch roads has been upheld by the Supreme Court of this State on several occasions, in which a most liberal construction has been given to the several Acts of Assembly under which the questions have arisen.

"In the case of the Mayor, etc., of the City of Pittsburgh *v. The Penna. Railroad Company*, 12 Wright, 365, it was held that the power of the company defendant to make branch or lateral roads is as large as the power granted for the construction of the main line; such branch roads could be carried, by the terms of the act of

¹ *Mine Hill & Schuylkill Haven R. R. Co. v. Lippincott*, 86 Pa. 468 (1878).

² *McAboy's Ap.*, 107 Pa. 549 (1884).

incorporation, into or through either of the counties into or through which the main line of their road should pass.

"In the case of the Western Pennsylvania Railroad Company's Ap., 3 Outerbridge, 155, it was decided that a railroad company is authorized by the 9th section of the Act of April 4, 1868, to construct a branch line from its terminus as well as from any other point on the line of its road.

"In McAbey's Ap., 11 Outerbridge, 548, the principles maintained in the cases referred to were affirmed. The construction of the proposed branch road was supported by a special grant of branching power given to the Pittsburgh & Connellsville Railroad Company by the Act of April 1, 1868, as well as by the general branching power conferred by the 9th section of the Act of April 4, 1868, upon which the defendants in this case rest their justification to construct their proposed branch road.

"Judge GORDON delivering the opinion of the court, says: 'This company must be regarded as the *locum tenens* of the State, and the legislature having conferred on it the branching power, it may do just what the commonwealth could do under like circumstances. The court also affirms the doctrine laid down in each of the cases cited, that the necessity for such branches and their directors by whom they are to be constructed.'

"To this is added the statement that the definition of a branch railroad does not depend either on its length or direction. The significant question is asked, if the projection of a completed road for one square is too short for a branch, then what distance will be required to allow the use of this term? The question, the court say, involves in itself its own absurdity.

"This line of decision is far-reaching in its results, and when it is placed in line, with the vast power which, by

the Constitution and Acts of Assembly, is given to railroad corporations, there seems but little for the citizens whose property is taken for railroad purposes to do but to submit, and if needs be to suffer, with what grace he may, this authorized spoliation of his property, for which he seldom or never receives an adequate compensation.

"As we understand the law applicable to this case, the defendants have the legal right to locate and construct their branch road, through and over the property of the plaintiff, and this requires that his application must be refused, and it is so ordered."¹

Where affidavits on behalf of the railroad company show that the construction of a branch railroad is for public trade or travel, the court will not restrain by preliminary injunction such construction upon the allegation of plaintiff that such branch is a private road, for the traffic and trade of certain iron-works.²

A siding is not a branch. A siding must be on the line of the railroad, and not a new departure entirely distinct, and running in a direction not covered by the charter. Thus a line of road sixty feet wide and running eight hundred feet to another road is not a siding but a branch.³

Under the Act of April 4, 1868, a company may construct a branch line from its terminus, as well as from any other point on the main line of its road.⁴

If a railroad company is authorized to build a branch line, the fact that no provision is made for the assessment of damages does not render the act void.⁵

¹ 1 Pa. C. C. R. 301 (1886); affirmed 115 Pa. 166 (1886).

² *Dolson v. Pennsylvania Schuylkill Valley R. R.*, 6 Montgomery County L. Rep. 109 (1890); *Rudolph v. Pennsylvania Schuylkill Valley R. R.*, 6 Montgomery County Law Rep. 111 (1890).

³ *Graff, Bennett & Co. v. Evergreen R. R.*, 2 Pa. C. C. R. 502 (1886).

⁴ *Western Pennsylvania R. R. Co.'s Ap.*, 99 Pa. 155 (1881).

⁵ *Pennsylvania Canal Co. v. Pennsylvania & Reading R. R.*, 2 Pearson, 354 (1879).

Power given in a charter of a Philadelphia street passenger railway company to construct "such branches as may be necessary to connect them with any other railway or railways within the said city," is to be confined in its operations to the railways in existence at the time.¹

The Act of May 21, 1881, authorizing railroad companies not exceeding fifteen miles in length to extend their lines, does not conflict with the provisions of the Act of April 4, 1868, giving branching power to railroads chartered thereunder. In *Vollmer v. Schuylkill River East Side R. R.*,² ALLISON, J., said: "It is contended that the power to extend lines of railroads, under the Act of 1881, is inconsistent with the exercise of the branching power given by the Act of 1868, and that the 9th section of said act must be regarded as inoperative and virtually repealed.

"It is not pretended that there is a repeal in terms by any portion of the Act of 1881, and a repeal of the said 9th section by implication is not to be favored. It is our duty to maintain the law as we find it on the statute book if it can be done. Are the two provisions so repugnant, the one to the other, that both cannot be maintained? We do not so regard them.

"There is no repugnance in a grant of power to extend railroad lines coupled with the power to issue stock and bonds, which will enable the corporation to raise an increased amount of money, and the grant of a right to extend a road by the construction of branches without the power to issue additional stock and bonds. Branch roads cannot be constructed without money, but if the corporation is possessed of it, or can obtain it without

¹ *People's Passenger Railway Co. of Philadelphia v. Marshall Street Passenger Railway Co.*, 8 Pa. C. C. R. 273 (1890).

² 1 Pa. C. C. R. 301 (1886).

issuing stock or bonds with which to build it, why should not such power be exercised, while at the same time the lines of the road may be extended or prolonged in the manner provided for in the Act of 1881?

"We, indeed, see no reason why an extension of lines of a railroad and a construction of branch roads may not both be done by the same corporation at the same time. The power to extend lines and construct branches each finding their separate authority and its limitations in the several Acts or parts of Acts of Assembly conferring power and prescribing condition, or without limitations or conditions, as the legislature may decide.

"The object which has been urged against this conclusion is that, under the branching power, the road may be extended of any length which the company may deem necessary to increase its business and accommodate the trade and travel of the public. The short roads, of less than fifteen miles in length, may extend branch roads to any part of the commonwealth.

"Without deciding that this is the logical and necessary consequence of a power to build branch roads, the answer to this objection is that we have nothing to do with the wisdom of incorporating in the fundamental law of the commonwealth a provision which authorizes citizens to take to themselves the powers of a railroad corporation, and enables them to exercise the sovereign power of eminent domain, and appropriate at their pleasure the houses and lands of the citizens of the commonwealth, so far as the same may be necessary, to the construction of railroads; nor have we, in construing these laws, to decide upon the wisdom or the expedience of a legislative grant of authority to make branch roads without restriction as to length or direction. Our duty is to try and ascertain what the law is, and not to say what we think it ought to

be, or to disregard it, if we should be of the opinion that these laws are to some extent subject to criticism, though not repugnant and in conflict with each other."¹

Art. xvii, § 1 of the Constitution, giving every railroad the right to intersect, connect with, or cross with its road any other railroad, does not authorize the connection of roads which are not contiguous, by means of a branch from the line of the main road, where the company has no statutory authority to build branches.²

Power of Pennsylvania Railroad Company to Build Branches.

174. The Pennsylvania Railroad Company has the same powers in constructing branches as it has for the construction of its main line. In *Mayor of Pittsburgh v. Pennsylvania R. R.*,³ the city of Pittsburgh attempted to restrain the Pennsylvania Railroad from constructing a branch connecting the main line with Pittsburgh & Steubenville Railroad Company in South Pittsburgh.

READ, J., said: "The real question in this case is whether the railroad company possess the power, under their charter, to build this branch road. The propriety of the location is not called in question by the appellants, who had passed an ordinance approving of it. This leads us to an examination of the act to incorporate the Pennsylvania Railroad Company, of the 13th of April, 1846, and its supplements. The 11th section authorized the president and directors of the company to construct a railroad with such branches or lateral roads as therein-after mentioned, beginning at the western terminus of the Harrisburg, Portsmouth, Mount Joy & Lancaster Railroad, in the borough of Harrisburg, and thence of a direct

¹ 1 Pa. C. C. R. 301 (1886), affirmed 115 Pa. 166 (1886).

² *Graff, Bennett & Co. v. Evergreen R. R.*, 2 Pa. C. C. R. 502 (1886).

³ 48 Pa. 355 (1864).

practicable route, and terminates at such point or points in, at, or near the city of Pittsburgh, or other place in the county of Allegheny, with authority to extend said road, or a branch thereof, to the town or harbor of Erie, in the county of Erie, as to the said president and directors may seem most advantageous or expedient. By the 5th section of the Act of 27th of March, 1848, the said road shall terminate at or near the city of Pittsburgh. The road, therefore—or, rather, the main line thereof—as authorized, was intended, with roads already in operation, to connect the cities of Philadelphia and Pittsburgh, which were only central corporations, about each of which were clustered several other municipalities, and forming together, as in the case of London, the commercial emporiums of Philadelphia and Pittsburgh. In the one instance, these are now all consolidated into one great city, which must soon be the case with the other.

“The last clause of the 17th section makes provisions for the branches or lateral roads mentioned in the 11th section in the following manner: ‘And it shall be lawful for the said company, in the manner and subject to the conditions and provisions hereinbefore provided in relation to the main line of their railroad, by this act authorized to be made, to make such lateral railroads or branches, leading from the main line of their said railroad to such convenient place or points in either of the counties, into or through which the said main line of their road may pass, as the president and directors may deem advantageous and suitable to promote the convenience of the inhabitants thereof, and the interests of the said company.’

“These branches or lateral railroads within the space of the counties mentioned, depend upon the discretion of the president and directors, who are made the judges of

the convenient place or points to which they are to be led, and also of their advantages, and whether they are suited to promote the convenience of the inhabitants of such counties, and the interests of the company. If these terms are fully complied with, then in making such branches or lateral railroads the company have, or using the language of the act, the president and directors have, exactly the same power and authority as they possess, and can exercise in constructing their main line. The branches and main line in these respects are placed on the same footing.

"The question then narrows itself down to what are the powers of the company in constructing the main line of their road? They are by the original act not to pass through any burying-ground or place of public worship, or any dwelling-house, without the consent of the owner or owners thereof. By the 3d section of the Act of March 27, 1848, the word dwelling-house is construed only to extend to the homesteads in possession and occupancy of the owner or owners, and shall not extend to dwellings kept for rent, full compensation to be made to the owners of such buildings for all damages, to be ascertained as in other cases. By the same act the county of Allegheny and the cities of Pittsburgh and Allegheny, and the municipal corporations in the county of Philadelphia, were authorized to subscribe to the stock of the company, and the subscription by the city of Philadelphia subscribed \$5,000,000, and Allegheny County \$1,000,000, to the stock of the company, the last subscription being made under a recommendation from a county convention of the citizens that the railroad company should establish the terminus of their road within the limits of the city of Pittsburgh. This was accordingly done by the company.

"The 5th section points out the course to be taken in

changing the site of any turnpike or public road, and the 1st section of an Act of April 12, 1851, directs that this shall be so construed as to include the streets, lanes, and alleys in any town, city, or borough through which it may pass.

"The cardinal object of the company has been to make Pittsburgh a great railroad centre, within whose limits all the railroads approaching it should connect with the Pennsylvania Railroad, a measure beneficial to the company and most advantageous to all the inhabitants of our Western metropolis. The connection is complete between the Pittsburgh, Fort Wayne & Chicago Railroad and the main line by a viaduct across the Allegheny, and it seems singular that there should be any objection to a similar connection between the Pittsburgh & Steubenville Railroad, in South Pittsburgh, and the Pennsylvania Railroad, by another viaduct across the Monongahela. Such a branch, therefore, from the main line, in Pittsburgh, crossing the Monongahela and running up to the Pittsburgh & Steubenville road, is within the very words and spirit of the 17th section, and the route which has been approved by the complainants is clearly the most advantageous and best suited to promote the convenience of the inhabitants and the interests of the company.

"It is clear, therefore, that the company have the power to make this branch, and that its speedy completion will greatly benefit the community. Transshipment of freight or passengers occasions delay and expense and great dissatisfaction. The Pennsylvania Railroad Company is the real owner of the main line of canal navigation, and of the railroads from Pittsburgh to the Delaware River, and when the connection is complete with the Steubenville road and with the road in Philadelphia leading to New York, there will be an uninterrupted line of travel by

land from Cincinnati to the latter city. The time cannot be far distant when the public convenience will force Pittsburgh and its sister city and their surrounding boroughs and municipalities to consolidate themselves into one great city, governed by one municipal legislature and one executive head. Its citizens will then regard with astonishment the local jealousies of the north and south banks of the two streams which here unite and form the great river Ohio.

"From what we have said it is apparent that we do not think the city of Pittsburgh has any right to control the defendants in the exercise of this power, particularly as they adopted the very plan for the construction of the branch which the plaintiffs approve. This being our opinion, it is unnecessary to discuss the collateral matters which have been pressed upon us, except to remark that the large expenditure already made on this branch is a strong additional reason to prevent any interference with it at this time, especially after the legislative recognition of it by the Act of April 23, 1864."

Under the Act of April 13, 1846, the Pennsylvania Railroad Company was authorized to make such lateral roads or branches to such convenient points in either of the counties through which the main line may pass as the president and directors may deem advantageous and suited to promote the convenience of the inhabitants thereof and the interests of said company. The Act of May 16, 1857, authorizing a sale of the public work, provided that any company that might purchase the railroad from the town of Columbia to the city of Philadelphia, should possess, hold, and use the same under the provisions of their act of incorporation, and any supplements thereto. The Pennsylvania Railroad Company bought the public work, and some years afterward began the construction of a

railroad from its main line in West Philadelphia by means of a bridge across the Schuylkill River, and a viaduct along Filbert Street to Merrick Street in Philadelphia. It was held that a preliminary injunction to prevent the construction of this extension or branch was properly refused. The Supreme Court simply affirmed the decree of the lower court without an opinion, but in the lower court Judge HARE placed the decision upon the ground that the company had the right to build the road under the authority contained in its charter to build lateral roads or branches.¹

The Act of April 10, 1867, which gives to the Pennsylvania Railroad power to construct and use along the lines of railroads now owned or leased by them additional tracks, sidings, depots, turn-outs, waterways, work-shops, and other appurtenances, does not authorize the company to build branch railroads from its leased roads.²

Power of Philadelphia & Reading R. R. Co. to Build Branches.

175. Under the Acts of April 13, 1846, § 17, P. L. 312, and April 12, 1864, P. L. 396, the Philadelphia & Reading R. R. Company may build branch roads from their main line, and for this purpose may appropriate land necessary for the construction of the branch.³

Sidings and Switches.

176. The right of a railroad company to make a railroad includes the right to make and maintain switches and sidings. "A power to build side tracks is essential to the purpose and use of the road. A power to build a railroad of a single track, without the means of passing

¹ *Duncan v. Pennsylvania R. R.*, 94 Pa. 435 (1880).

² *Pennsylvania R. R. Co.'s Ap.*, 115 Pa. 514 (1886).

³ *French v. Philadelphia & Reading R. R.*, 13 Phila. 187 (1879). See *Philadelphia v. Philadelphia & Reading R. R.*, 7 Pa. C. C. R. 390 (1889).

the trains or of leaving the track for the shifting of cars, or of repairs at the shops and yards, and without standing room for the cars not in motion, would be clearly wanting in all that is necessary to safety, convenience, and utility, and would be vain and nugatory.”¹ In the authority to construct a railroad is included the right to construct sidings and branches to the company’s wharves.² If a railroad company locates its switches in one place, it is not deprived of the power to locate them elsewhere when necessity arises.³

The words “switches or turn-outs” are equivalent to sidings in an agreement between a railroad company and property-owners, providing that the company should build a “single track only, without sidings for standing or passing trains,” and should at no time “construct any such switches or turn-outs.” In such a case a city ordinance gave permission to the railroad company to build suitable turn-outs into warehouses. The company after the agreement referred to was made, constructed such a turn-out into a warehouse. It was held, that the company in doing so did not violate the agreement.⁴

When a railroad company has constructed its road within the period limited by law, it may subsequently construct, from time to time, such switches or sidings as may be necessary for the handling of its business and the operation of its road. Were it otherwise, it would be impossible for a railroad company to keep pace with the increasing demands of business, and to accommodate the public.⁵

¹ *Cleveland & Pittsburgh R. R. v. Speer*, 56 Pa. 325 (1867); *Stroudsburg Borough v. Stroudsburg Pass. R. R.*, 12 Pa. C. C. R. 124 (1892).

² *Black v. Philadelphia & Reading R. R.*, 58 Pa. 249 (1868).

³ *Cleveland & Pittsburgh R. R. v. Speer*, 56 Pa. 325 (1867).

⁴ *Philadelphia & River Front R. R.*, 133 Pa. 134 (1890).

⁵ *Pottsville v. People’s Railway*, 146 Pa. 175 (1892).

A land-owner filed a bill in equity against a railroad company to enjoin them from entering upon and occupying his land with sidings, averring that said entry and occupancy were only for the purpose of securing to the company greater facilities for the carrying on of their private business of mining, transporting, and selling coal. The evidence disclosed the fact that said entry would in addition straighten the company's track and facilitate its general freight business. It was held that the preliminary injunction which had been granted was properly dissolved.¹

The right of a railroad company to locate its road in a public street cannot be attacked after the road has been constructed, in a proceeding to prevent the company from building a siding.²

Permission given by a borough to a railroad company to lay a track upon a street carries with it the right to construct necessary turn-outs and sidings for the accommodation of business establishments.³

Gauge.

177. If the charter of a railroad company contains no restriction as to the gauge of its track, it has the right to adopt any gauge in ordinary use, and if it adopts a narrow gauge at first, it is not thereby concluded from afterward changing its gauge or the character of its rails in any way it chooses, provided that it keeps within the limits of its chartered rights. In such a case the court said, "So too, it is urged that there was no power to change the gauge of the road from a narrow gauge of three feet to the wider one in ordinary use. But, as all the powers con-

¹ *Slocum's Ap.*, 12 W. N. C. 84 (1882).

² *Cleveland & Pittsburgh R. R. v. Speer*, 56 Pa. 325 (1867).

³ *Norristown v. Pennsylvania R. R.*, 3 Montgomery County L. Rep. 5 (1886).

ferred upon railroad companies generally by the Act of February 19, 1849, are extended to the defendant company by the 2d section of its supplement, and they would necessarily have the same right to adopt any gauge in ordinary use, or that they might desire, which any railroad company would have under the general railroad law of the State. If it be said that the defendant adopted the narrow gauge at the time its road was built, and has used it ever since until now, as is alleged in the bill, the reply is at once manifest that it is not at all concluded by such original adoption and continuous use. It parted with no right thereby to make any change in the gauge of its track or the character of its rail which its own interests or the advance in the science of railroad building might suggest, always, of course, within the limits of its chartered rights. It might as well be argued against the proposed change of gauge that because a particular kind of rail was in vogue, and was actually adopted and used by a railroad company at and after the time of the construction of its road, it could never adopt another, but was concluded by its first choice, upon the theory of an exhaustion of its power. It will be seen at once that such an argument is entirely fallacious and untenable. Instead of such being the law, we have always held that railroad companies not only have the right, but are by law bound to make use of the latest and best inventions and appliances tending to promote the comfort and safety of the public. This is notably the case in the matter of spark-arresters, and is equally applicable to couplings and other contrivances. The writer remembers when strap rails, laid upon longitudinal stringers and fastened down with spikes, were in common use on steam railroads; and he also remembers that snake-heads at the ends of the rails resulted from this method,

occasioning frequent accidents and loss of life. When the T rails came into use it became the undoubted legal duty of the old companies to abandon the flat rail, and use the new one, and any company failing to perform this duty would very quickly have received forcible and emphatic admonition to that effect both from juries and courts."¹

Where a railroad is purchased under the Act of April 8, 1861, the purchasers organized into a new corporation may under the Act of February 11, 1853, adopt any gauge which may seem best to them.²

An Act of Assembly authorized a railroad company to construct a railroad, "to connect with any railroad constructed or to be constructed at any point on the northern boundary of Erie or Warren County." The act directed "that the gauge of said road shall not exceed four feet ten inches." The court held that "said road" referred to the road of the company incorporated and not to the road "constructed or to be constructed."³

¹ *Millvale Borough v. Evergreen Railway Co.*, 131 Pa. 1 (1889).

² *Com. v. Central Pass. Ry. Co.*, 52 Pa. 506 (1860).

³ *Com. v. Cross-Cut R. R. Co.*, 53 Pa. 62 (1866).

CHAPTER XI.

USE OF STREETS AND ROADS.

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| 178. Right of Legislature to Grant Use
of Streets. | 180. License to Use Street. |
| 179. Municipal Control of Streets. | 181. Obstruction of Streets. |

Right of Legislature to Grant Use of Streets.

178. In the absence of a legislative grant, a railroad company has no right to appropriate or use a street or public highway for the laying of the tracks of its main line, switches, sidings, or branches.¹ The legislature may, however, authorize a railroad company to build its railroad on a street or other public highway. In *Com. v. Erie & North East R. R. Co.*, BLACK, C. J., said: "The right of the supreme legislative power to authorize the building of a railroad on a street or other public highway is not now to be doubted. It has been settled not only in England (1 Barn. & Ad. 30), but in Massachusetts (23 Pick. 328), New York (7 Barb. 509), and in Pennsylvania (6 Whart. 43). If such conversion of a public street to purposes for which it was not originally designed, does operate severely upon a portion of the people, the injury must be borne for the sake of the far greater good which results to the public from the cheap, easy, and rapid conveyance of persons and property by railway. The commerce of a nation must not be stopped or im-

¹ Pennsylvania R. R. Co.'s Ap., 115 Pa. 514 (1886).

peded for the convenience of a neighborhood. But we can say this only in cases where the authority has been given by the sovereign power of the State. That any private individual or incorporated company, not empowered to do so by an act of the legislature, can take possession of a street and make a railroad upon it without being guilty of a criminal offense, is a proposition which I am sure no lawyer would dream of making. The right of a company, therefore, to build a railroad on the street of a city, depends, like the lawfulness of all its other acts, upon the terms of its charter. Of course, when the power is given in express words, there can be no dispute about it. It may also be given by implication; for instance, if a company be authorized to make a railroad, by a straight line between two designated points, this implies the right to run upon, along, or across all the streets or roads which lie in the course of such line. So also when an act of incorporation directs a road to be made between certain termini, by such route as the grantees of the privilege shall think best, it may be located on an intervening street or other common highway, if in the judgment of the directors it be necessary or expedient to do so."¹

A statute granting a railroad company the right to lay its rails in the streets of a city or town, does not violate the provision in the Constitution that private property shall not be taken for public use without compensation. The earliest and leading case in Pennsylvania where this rule was laid down was the *Philadelphia & Trenton Railroad Co.'s Case*,² in which Chief Justice GIBSON, said: "What is the dominion of the public over such a street?"

¹ 27 Pa. 330; *Danville, Hazleton & Wilkes-Barre R. R. v. Commonwealth*, 73 Pa. 29 (1873); *Philadelphia v. Philadelphia & Reading R. R.*, 7 Pa. C. C. R. 390 (1889).

² 5 Wharton, 25 (1840).

In England, a highway is the property of the king as parens property of the people, not of a particular district, but of the whole state; who, constituting as they do the legitimate sovereign, may dispose of it by their representatives, and at their pleasure. Highways, therefore, being universally the property of the State, are subject to its absolute direction and control. An exclusive right of ferriage across a navigable stream, which is a public highway, is grantable only by it; and the navigation of the stream may be impeded or broken up by it at its pleasure. In the construction of her system of improvements Pennsylvania has acted on this principle. Her dams across her principal rivers to feed her canals have injured if they have not destroyed the descending navigation by the natural channels and this without a suspicion of want of constitutional power. The right of passage by land and by water is a franchise which she holds in trust for all her citizens, but over which she holds despotic sway, the remedy for an abuse of it being a change of rulers and a consequent change of the law. No person, natural or corporate, has an exclusive interest in the trust, unless she has granted it to him. Her right extends even to the soil, being an equivalent for the six per cent. thrown into every public grant as compensation of what may be reclaimed for roads; and she has acted on the basis of it; for though damages for special injuries to improvements have been allowed to the general road laws, nothing has been given for the use of the ground. This principle was broadly asserted in *Commonwealth v. Fisher*, 1 P. & W. 466.

“Such being a highway as a subject of legislative authority, in what respect is a street in an incorporated town to be distinguished from it? A municipal corporation is a separate community; and hence a notion

that it stands in relation to its streets as the State in relation to the highways of its territory, that would make it sovereign in its precincts, a consequence not to be pretended. The owner of a town plot lays out his streets as he sees fit, or the owner of ground in an important town, dedicates it to public use as a street; but it follows not that the dominion of the State is not instantly attached to it. The general road law extends to every incorporated town from which it is not excluded by provision of the charter; and the statute book is full of special acts for opening, widening, altering, or vacating streets and alleys in Philadelphia and our other cities. Were it not for the universality of the public sovereignty, the public lines of communication, by railroads and canals, might be cut by the authority of every petty borough through which they pass; a doctrine to which Pennsylvania cannot submit, and which it would be dangerous to urge. It would be strange, therefore, were the streets of an incorporated town, not public highways, subject perhaps to corporate regulation for purposes of grading, curbing, and paving; but subject also to the paramount authority of the legislature in the regulation of their use by carriages, rail-cars, or means of locomotion yet to be invented, and this without distinction between the inhabitants and their fellow-citizens elsewhere. The doctrine was carried to its extent in *Rung v. Shoneberger*, 2 Watts, 23, in which it was affirmed that though a city has a qualified property in its public squares, it holds them as trustee for the public for whose use the ground was originally left open, and that the enjoyment of them is equally free to all the inhabitants of the commonwealth, subject to regulations not inconsistent with the grant. In *Barter v. Commonwealth*, 3 P. & W. 259, it was inadvertently said that the title to the soil of a

street is in the corporation, whose right to improve it for purposes which conduce to the public enjoyment of it, is exclusive and paramount to the right of an inhabitant. The point was only incidentally involved, and consequently not very particularly considered; but the question of title, involving as it has done, no more than the bounds of the grant, has lain between the grantor and the grantee or those deriving title from them. In no case has title been claimed by the corporation. In the *Union Burial Ground Society v. Robinson*, 5 Wharton, 18, in which the point was elaborately argued, the contest was betwixt the grantor and the purchaser from the grantee; and though the case was eventually decided on another ground, the court inclined to think, on the authority of many decisions, that the title to the street, even if it had been opened, would have remained in the grantor; and such appears to be the principle of *Kirkham v. Sharp*, 1 Wharton, 323. The legal title to the ground, therefore, remains in him who owned it before the street was laid out; but even that is an immaterial consideration; for an adverse right of soil could not impair the public right of way over it, or prevent the legislature from modifying, abridging, or enlarging its use, whether the title were in the corporation or in a stranger. I take it then that the regulation of a street is given to a corporation only for corporate purposes, and subject to the paramount authority of the State in respect to its general and more extended uses; and that there would have been no invasion of chartered rights in this instance, even did either of these districts stand in a relation to the public which would impart to its charter the qualities of a compact.

“What then is the interest of an individual inhabitant as a subject of compensation under the constitutional in-

junction that private property be not taken by a corporation for public use without it? Even agreeing that his ground extends to the middle of the street, the public have a right of way over it. Neither the part used for the street, nor the part occupied by himself is taken away from him; and as it was dedicated to public use without restriction, he is not within the benefit of the constitutional prohibition which extends not to matters of mere annoyance. The injury of which he can complain is not direct but consequential. It consists either in an obstruction of his right of passage, which is personal; or in a depreciation of his property by decreasing the enjoyment of it: but no part of it is taken from him and acquired by the company. The prohibition even when it precluded a seizure of private property immediately by the State was not largely interpreted, nor was there reason that it should be, as ample compensation was obtained from her sense of justice without it. The sufferers were overpaid, and this sort of aggression was always courted as a favor. But though she usually compensated consequential damages, it was of favor, not of right. Nor did she always make such compensation. In one well-known instance she destroyed a ferry by cutting off access to the shore without provision for the sufferer; and in the *Commonwealth v. Fisher*, 1 P. & W. 467, damages were unavailingly claimed from her for flooding a spring by a dam. The clause in the amended Constitution which narrows the former prohibition to a taking of private property for a public use by a corporation, is to receive the same construction; the word 'taking' being interpreted to mean taking the property altogether; not a consequential injury to it which is no taking at all. For compensation of the latter the citizen must depend on the forecast and justice of the legislature."

Municipal Control of Streets.

179. The consent of a municipal corporation to the use of a street is without effect if the municipality had no authority from the legislature to give such consent. In *Com. v. Erie & North East R. R.*,¹ BLACK, C. J., said: "It appears that the city authorities gave their consent to the use of the streets and to the location of the railroad on the ground which it now occupies. This privilege was given 'so far as the mayor and councils have legal power in the premises,' upon condition that the railroad should cause the least possible obstruction to the ordinary travel and business of the streets, and with a reservation of the right to withdraw the privilege whenever it should appear to the councils to be injurious to the interest and welfare of the city. The condition was broken and the privilege was revoked. But if the resolution of the councils had remained in full force up to this time it would have been of no avail here. They had no 'legal power in the premises.' An act of the legislature cannot be repealed or modified by the ordinance of a city corporation. What the defendants did not disregard of the law was no less an offense against the rights of the public because the city was in some sort *particeps criminis*. If both had persisted in it the commonwealth's duty would have required her to see that the rights of her citizens were vindicated against both."

A municipality cannot grant to a railroad company the right to lay its tracks upon a common in which all of the citizens have a beneficial estate. The railroad company cannot take such land without making compensation to the commoners.²

As the legislature has the right to authorize the build-

¹ 27 Pa. 339 (1856).

² *Bell v. Ohio & Pennsylvania R. R.*, 1 Grant, 104 (1854).

ing of a railroad on a street or other public highway, such right may be devolved upon a municipal corporation.¹

In the absence of evidence to the contrary, it will be presumed that tracks laid in a street have been laid under legislative and municipal authority. Property-owners upon an unopened street upon the city plan granted to a railroad company, by an agreement in writing, the use of twenty feet of the middle of the street for its road-bed free of charge. The company agreed to curb and pave fifteen feet on each side of the road-bed, "to remain open for public use as a public highway forever." A bill was filed by the successor of the title of one of the owners to compel the railroad company to remove its tracks laid on the street outside of the limits of the twenty feet granted. The bill contained no averment that the tracks complained of had been laid without authority of law. It was held that the bill could not be sustained, as such an averment was absolutely essential.²

A municipality may authorize a railroad company to erect a small watch-house upon a public street near the tracks of the railroad,³ or to lay double tracks on a street "where the width of the street shall render the same practicable."⁴

A city granted to a railroad company a right to cross a street to connect with another railroad. The ordinance contained a proviso limiting the time for completing such connection to two years from the date of its passage, and requiring the selection of one of the two routes named therein within six months thereafter. The railroad company proceeded at once, executed contracts, made large

¹ *Mercer v. Pittsburgh, Fort Wayne & Chicago R. R.*, 36 Pa. 99 (1859).

² *Kemble v. Philadelphia, Germantown & Norristown R. R.*, 140 Pa. 14 (1891).

³ *Wilson v. Philadelphia & Reading R. R.*, 5 W. N. C. 185 (1878).

⁴ *Knickerbocker Ice Co. v. Philadelphia & Reading R. R.*, 15 Phila. 48 (1881).

expenditures, and incurred large liabilities. It was held that the time mentioned in the ordinance was not of the essence of the contract, because the city could derive no benefit from its performance, nor sustain any injury by its breach.¹

A borough may forbid a railroad company from running trains across any street in the borough without erecting gates and providing watchmen. An ordinance to such effect is, however, penal in its nature and must be strictly construed.²

License to Use Streets.

180. Where a railroad company has a mere license to use tracks on a street, the license may be revoked at any time by the municipality.³

And a mere license to construct a turn-out from a warehouse to a railroad may be revoked by the municipality. In *Branson v. Philadelphia*,⁴ AGNEW, J., said: "The license in these cases is simply a 'permission to construct a turn-out from the city railroad, . . . agreeably to an ordinance passed April 24, A. D. 1851.' The ordinance referred to merely authorizes the committee on public highways 'to grant permission to persons or companies owning or occupying properties situate upon the streets through which the railroads belonging to the city are laid, to attach turn-outs or bolting tracks thereto.' . . . 'And such permission shall be in writing, and shall be subject

¹ *Pittsburgh, Fort Wayne & Chicago R. R. v. Pittsburgh*, 1 *Pittsburgh Rep.* 392 (1858).

² *Winton Borough v. Delaware & Hudson Canal Co.*, 11 *Pa. C. C. R.* 167 (1892).

³ *Southwark Railroad Co. v. Philadelphia*, 47 *Pa.* 315 (1864). But where the right to use the street depends upon a contract with the city and the State, nothing short of the exercise of the power of eminent domain, accompanying the compensation, can defeat the rights of the company: *Philadelphia & Reading Railroad Company v. Philadelphia*, 47 *Pa.* 325 (1864).

⁴ 47 *Pa.* 329 (1864).

to the provisions of this and all other ordinances relating to the railroad in the city of Philadelphia.' At the foot of the license the city clerk notes, 'Received \$10 for this permit.'

"It is contended that the city cannot annul the license to construct and use the turn-out thus granted for a valuable consideration, and on the faith of which the licensee incurred heavy expenses in the erection of buildings and improvements necessary for a business dependent on the existence of the license; and a number of authorities are referred to, to show that a license which has led to expenditures upon the faith of it, is a contract and is irrevocable: *Rerick v. Kern*, 14 S. & R. 267; *McKillip v. McIlhenny*, 4 Watts, 322; *Swartz v. Swartz*, 4 Barr, 358; *Campbell v. McCoy*, 7 Casey, 263, etc.

"Without deciding the point, perhaps it might not be going too far to say that as long as the licensee conforms to the rules made for the government of his license, the contract implied in its terms may not be revoked or directly impaired. But the decision of this case depends upon a different principle. Perhaps it might be sufficient to say that he took the license expressly subject to 'all other ordinances relating to the railroad in the city of Philadelphia,' which would imply the right to cut off such turn-outs, when the city should deem it proper as a measure necessary for the public welfare. But we do not rest the case upon the terms of the ordinance authorizing the permits.

"Every license from a public authority, whether a municipality, exercising a portion of the high powers of eminent domain, or the immediate agents of the commonwealth herself, necessarily takes it subject to this right of eminent domain, to be exercised for the benefit of the public in the future, as well as in the past. It is

one of the fundamental rights of the government, never stationary, but ever keeping step with the march of science, art, and public improvement. Turnpikes and canals have had their day, attracting to their sides the industries and capital of the citizens, whose improvements and business rose, flourished, and decayed along with their rise, progress, and decline.

“But who has ever heard it said that the commonwealth is bound to maintain her works merely because their use has thus built up a business dependent upon them? Unquestionably actuated by a spirit of benevolence and parental care, which induces her ever to guard the interests of all her children, she will never abandon such a work unless a greater interest dictates the necessity, and she will often resort to some mode of averting the injuries consequent. But no obligation at law requires her to repair the mere consequences collaterally falling upon those who suffer from the exercise of a great reserved power of acting for the general good: *Monongahela Navigation Company v. Coons*, 6 W. & S. 101; *Henry v. Pittsburgh & Allegheny Bridge Company*, 8 W. & S. 85; *Zimmerman v. Union Canal Company*, 1 W. & S. 346; *Commonwealth v. Fisher*, 1 P. & W. 462; *Philadelphia v. Trenton Railroad Company*, 6 Whart. 25, 44-5; *Susquehanna Canal Company v. Wright*, 9 W. & S. 9.

“In these cases it is affirmed to be a fixed principle that the State is never presumed to have parted with one of its franchises in the absence of conclusive proof of such intention. So long as a railroad, or other public improvement, is maintained, it may be that a contract for its use will be protected according to the terms of the license. But clearly this does not import as against the public possessing the high power of eminent domain, a contract of guaranty to continue the work to which the license

attaches. The right to construct, to alter, to change, and to abandon, all fall within the same reserved power. It is a franchise of the State, which cannot be yielded up without the clearest proof of intention. In one sense it may be said it cannot be yielded up at all, as the power of eminent domain, when necessary for the public good, may justify a fresh taking, only that in this case compensation must be made.

"But, testing the license by the rule of construction stated, there is not a shadow of proof that the license imports any parting with the right to abandon the railroad, or implies any guaranty for its continuance. This is clearly so were the State herself the party, and in this respect there is no difference between the city and the commonwealth."

Obstruction of Streets.

181. A provision in a charter that the railroad company shall not obstruct or impede the free use of a street, does not prohibit the company from occupying a street, but merely prohibits it from materially obstructing the street. In *Com. v. Erie & North East R. R.*,¹ BLACK, C. J., said: "The act of incorporation now before us, contains the following very emphatic clause: 'The said railroad shall be so constructed as not to obstruct or impede the free use of any public road, street, or bridge, now laid out, open, or built, or to interfere with any burial-ground, dwelling-house, or building without the consent of the owner.' It would certainly strike most men upon the first look that a railroad company with such a provision in its charter is on dangerous ground when it takes possession of a street. It is not easy at all to understand how the people of a city can have the use of a street, free

¹ 27 Pa. 339 (1856).

from obstructions and impediments, when the street is of ordinary width, and has two railroad tracks upon it, along which locomotive engines, with trains of cars, are running every five minutes of the day. Nor is it by any means impossible, that in this case the legislature intended to exclude the company altogether from the streets, even at the risk of having no railroad made; for the desire to preserve to the people of Erie and its neighborhood the free use of their streets and roads may have been stronger than the wish to establish a railway communication for them with New York.

“An obstruction is anything set in the way, whether it totally closes the passage or only hinders and retards progress. A road may be obstructed more or less. The word impediment is almost synonymous with obstruction, except that it is seldom, if ever, used to signify an entire blocking up of the way. It is an obstacle—not an impassable barrier. To understand these words in their ordinary import, and then say that a railroad is not *per se* an obstruction or impediment to the free use of a street by the public is rather more than I can do. But perhaps it is not quite safe to interpret them according to their popular sense. Certain it is that they have sometimes been otherwise used in Acts of Assembly. A law of Massachusetts provides, that ‘if any railroad shall be so laid out as to cross any turnpike or other way, it shall be so made as not to obstruct such turnpike or way.’ It was decided (23 Pick. 326) that this did not prevent all interference with the road, but required only that it should cause the least possible inconveniences or impediment. By a statute of this State, enacted in 1803, the owners of land adjoining navigable streams were permitted to build dams, provided that such dams should ‘not obstruct or impede the navigation of such streams, or

prevent the fish from passing up the same.' This court (4 Watts, 440) declared, that if these words were taken literally, the owners could not avail themselves of the privileges at all; but as this construction would have been contrary to the grant itself, a more liberal one was adopted, and a dam which did not materially hinder the navigation was held not to be within the prohibition. Although the reasoning of these cases does not altogether fit the one before us, they are entitled to much weight. They are decisive, indeed, of one thing which is important, namely: that the words in question may sometimes have a legal signification different from that which we would otherwise have been disposed to assign them. For the sake of consistency we must follow in the steps of those who went before us, though it be clear that the track is not very clearly marked.

"Let it then be conceded as a possible thing that a railroad can be so constructed on a public street that it will not be an obstruction to its free use; that such railroad is not in any sense a nuisance *per se*; that a street may be occupied in common by a railroad and the public without any such inconvenience to the latter as will amount to an impediment, or abridge the freedom of its use for ordinary purposes; still, it is not true (as the converse of the argument would make it) that the street is unobstructed as long as travel upon it is not entirely prevented. If it may be proved that a man may squeeze himself along beside the track, or dodge across at the peril of his life, it does not follow that the use of the street is free, unobstructed, and unimpeded. We hold, therefore, that, under a charter like this, a railroad cannot be built on a street in such a manner as to cause any material obstruction. If we assume, as we do, that the clause under consideration does not entirely forbid the

company from going on any street, we must also allow them to create such impediments as cannot be avoided. But those which are not absolutely necessary to the making and using of a railroad are unlawful, for managers are bound to leave the street as nearly free from obstructions as they can, and for that purpose to spare no reasonable expenditure of money or labor. If, for instance, the railroad be made above the level of the street, they must grade the rest of the street also, if that will make it better for the public accommodation. They cannot say to the city authorities, We have destroyed your street and rendered it impassable, but we have not impeded its free use, because you can restore it again to a tolerable condition, at your own expense. Neither does it make any difference whether it be a main thoroughfare or an unimportant by-street, for this act of incorporation protects all alike.

“ We have attentively considered the bill, answer, and evidence in the cause, and they satisfy us of the following facts: 1. A considerable portion of one street within the present limits of Erie City is occupied almost entirely by the railroad in a manner which makes any considerable use of it for other purposes almost impossible; and this is true, although the defendants themselves say that the street may be safely and conveniently used if it were properly graded, a duty which they left unperformed. 2. Two streets are crossed by the railroad on bridges, which are too low and too narrow for large wagons passing one another, or for a single wagon with a bulky load. Two other streets are crossed on an embankment, considerably above grade, with a ditch on each side, and thus all passage along those streets by any kind of vehicle is as completely stopped as it could be by a stone wall twenty feet high. All these things are illegal, for the

reasons given. That some of these streets are on low, wet ground, and little used, might be a sort of apology for the defendants, if we were sitting here to take excuses for the violation of the law. But this is no part of our duty."

A railroad company has no right to load and unload its cars in a public highway.¹

A person who is injured by an obstruction which a railroad company has placed in a public highway, may sue either the railroad company or the municipality. The railroad company may be ultimately liable to the municipality, but this consideration does not prevent the person injured from first instituting his suit against the railroad company. Thus if a railroad company appropriates a part of a public road and builds a bridge over the railroad as a substitute for the part of the highway appropriated, both the railroad and township are charged with the duty of maintaining the approaches to the bridge in a safe condition for public travel, and if a person is injured by reason of the unsafe condition of the approaches to the bridge, he may at once sue the railroad company.²

If a township is compelled to pay damages to a person who is injured on a road which was rendered unsafe by the construction of a railroad, the railroad company is bound to indemnify the township for the damages paid, and for the costs and expenses incurred in defending the action.³

¹*Rust v. Pennsylvania R. R.*, 16 W. N. C. 286 (1885).

²*Gates v. Pennsylvania R. R.*, 150 Pa. 50 (1892).

³*Aston Township v. Chester Creek R. R.*, 2 Delaware County, 9 (1883).

CHAPTER XII.

CHANGING SITE OF HIGHWAY.

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| 182. Reasonable Necessity must be Shown. | 190. Construction of New Road by County Authorities. |
| 183. Changing Site to Avoid Grade Crossing. | 191. Acquiescence of Public Authorities. |
| 184. Road need not be Appropriated Longitudinally. | 192. Release of Liability to Construct New Road. |
| 185. Changing Site of Street. | 193. Lessee of Railroad Must Reconstruct. |
| 186. When the New Road must be Built. | 194. Owner of the Soil of the Road Entitled to Damages. |
| 187. Entrance to Old Road must be Closed. | 195. Private Ways. |
| 188. Repair of Highway. | 196. Remedies. |
| 189. Repair of Bridge. | 197. Indictment for Obstructing Road. |

Reasonable Necessity must be Shown.

182. A railroad company will be enjoined from changing the site of a public road unless reasonable necessity for the taking of the road is shown. The mere difference in expense between a fill and a bridge is not a sufficient justification for the taking of the road, unless the difference in cost is unreasonable.¹

In the absence of a reasonable necessity, a railroad company cannot locate a bridge in such a manner that

¹ Moreland Township v. Pennsylvania R. R., 6 Montgomery County L. Rep. 165 (1890); Pennsylvania R. R. v. Diem, 128 Pa. 509 (1889).

A purchaser of public works from the State is bound to rebuild a bridge over a canal, which is necessary for the public, although the State could not have been compelled to rebuild the bridge: Penna. R. R. Co. v. Duquesne Borough, 46 Pa. 223 (1863).

the piers will cut off twenty feet from a sixty-feet wide road.¹

A railroad company proposed to build the abutment of a bridge so as to get five feet into an established public road thirty-three feet in width. The only purpose of so placing the abutment was to save the railroad five feet additional span to the bridge. It was held that there was no reasonable necessity for such obstruction of the highway, and the company was enjoined.²

A railroad company crossed an established highway at an angle of about forty-five degrees. At the place of crossing, the railroad company's tracks, as contemplated, would come about thirteen feet above the grade of the road. From a distance of about two hundred feet from each side of the embankment thus made across the highway, defendants began constructing approaches with a grade of from five and one-half to seven feet to the one hundred. The railroad company also constructed a new piece of road about three hundred yards long, leading from a point in said highway to another highway, into which it ran, by means of which the above railroad crossing could be avoided by the loss of about one hundred yards in the distance to any given point on the first-mentioned highway. The township through one of its supervisors filed a bill to restrain the railroad company from obstructing the highway by the embankment and crossing, and praying that the railroad company be required to remove the obstruction and maintain a bridge or culvert over the highway at that point. After answer and proof and reference to a master, the court held: That the bill would lie by the township to abate a public nui-

¹ *Chester Township v. Baltimore & Philadelphia R. R.*, 3 Delaware County, 151 (1887).

² *Schwenk v. Pennsylvania Schuylkill Valley R. R.*, 2 Chester County, 177 (1883).

sance on the highway : That under the Act of February 19, 1849, § 12, the railroad company had a right to intersect the highway in such manner as not to impede transportation along the same—*i. e.*, not to endanger or unnecessarily interfere with the reasonable passage over it ; that § 13 of the said Act of 1849 authorizing a railroad company to change the site of any public highway, under certain conditions, was applicable to the railroad company in this case, although the railroad company had not longitudinally appropriated the highway, but had simply crossed it at an angle of forty-five degrees with an embankment ; that the strip of new highway above referred to, constructed by the railroad company gave travelers the choice of making the ascent and crossing the tracks or going one hundred yards further and keeping to a practically level road ; that, having made these provisions for the public safety and convenience, the railroad company should not be enjoined. The bill was dismissed and upon appeal the decree was affirmed.¹

Changing Site to Avoid Grade Crossing.

183. Under the Act of February 19, 1849, § 13, a railroad company has the right to change the site of a public road to avoid a grade crossing, if necessity requires it, and the necessity is to be determined in the first instance by the railroad company in the exercise of its sound discretion.²

A grade crossing may be abolished by a railroad company, even where the crossing has been in existence for a long period of time, if increase of travel on the railroad shows the necessity therefor. A railroad crossed at

¹ North Manheim Township v. Reading & Pottsville R. R., 3 Ban. Supreme Court Dig. 190 (1888).

² Abington Township v. North Pennsylvania R. R., 12 Pa. C. C. R. 118 (1892).

grade two public roads intersected at right angles at a point about one hundred feet north of the railroad. The travel on the railroad having greatly increased, the company built a wagon road south of the railroad and parallel thereto, connecting the two public roads. From the connecting road the company built another road passing under the railroad to the original intersection. It was held that a preliminary injunction would not be granted restraining the railroad from completing the connecting road and vacating the grade crossings.¹

Road need not be Appropriated Longitudinally.

184. The right of the Pennsylvania Railroad Company to change the site of a public highway is not confined simply to cases where the highway is occupied, longitudinally by the railroad, but exists also in cases where the construction or reconstruction of its road-bed across a highway renders such a change of site necessary. In such a case it is not essential that the necessity to justify the change should be one insurmountable by engineering skill and money. The determination of the question of necessity is in the first instance for the railroad company, and in the absence of an abuse or misuse of the power thus committed to it, the discretion of the company will not be interfered with by the courts. In such a case the court, through WILLIAMS, J., said: "The question in any given case is not what is possible but what is reasonably practicable. In the case before us, it appears by the findings of the master that the railroad company encountered the following difficulties in determining what to do with the Newport road. To make a crossing at grade would require a through cut eight feet deep at the side of the railroad, to be continued back from the road fully two

¹ Abington Township v. North Pennsylvania R. R., 12 Pa. C. C. R. 118 (1892).

hundred feet. At a distance of one hundred feet from the railroad this cut would be five feet deep on one side with a bank twelve feet high on the other. The descent along its whole length would be at the rate of seven and a half feet in a hundred. It would cross the tracks on a diagonal line, the tracks being on a three and a half degree curve. Both the curve in the railroad and the cut for the public road would contribute to make the crossing dangerous to the public and inconvenient to the railroad company. To cross by an overhead bridge would require a structure three hundred and thirty feet long with a grade of fifteen feet in a hundred. An underground crossing would require an excavation under the tracks fifteen feet in depth, with an approach from the south of six hundred and fifty feet, with an average grade of eight feet in a hundred. The company decided that neither of these was reasonably practicable, but that it was necessary, in view of all the circumstances, to remove the road a short distance, and to reconstruct it on better ground, with better grades and with an overhead crossing.

"This was done. If this was an unauthorized exercise of power, the objection should have been made before the new road was laid out by the court and the work of reconstruction completed by the railroad. It might be raised in a proper way even now, but until it is raised and disposed of in an orderly and legal manner, the decision of the railroad company must stand. The supervisors are proposing on their motion and by their own authority to restore the crossing which has been supplied. They would overrule the decision of the railroad company on the question of necessity which the Act of Assembly left to it for determination, and proceed to undo what it has done in the premises, without the aid of legal process or the judgment of the courts. This will

not do. The supervisors may as well open a grade crossing at any other point on the line of the railroad, without authority, as to do it here. The railroad company necessarily appropriated a part of the Newport road in the improvement of its tracks. It decided that it was reasonably necessary to remove or reconstruct that part of the road. They sought and obtained the authority of the Court of Quarter Sessions of Lancaster for laying out and opening the new road. They did the work of reconstruction at their own cost and built a safe overhead crossing at a convenient point. The public took possession of the reconstructed road and has used it for several years. These proceedings have the effect of informally vacating so much of the old road as is thus supplied, and there is no power in the supervisors to revise and reverse all that has been done and restore the supplied crossing."¹

Where a railroad company occupies a considerable portion of a public road, not by crossing it, nor by passing along it at grade, but by constructing upon it a retaining wall of stone, and a high embankment, upon which the railroad bed was built, the company is bound at its own expense to change the site, and reconstruct the road for the public use.²

Changing Site of Street.

185. A railroad company cannot occupy a street to the exclusion of the public, without locating or constructing another street in the place of the street so taken. Where a railroad company proposes to occupy a public street in such a way as to force the public in passing along the street to use the track of the railroad for a distance of two

¹ *Pennsylvania Railroad v. Diem*, 128 Pa. 509 (1889); *Moreland Township v. Pennsylvania R. R.* 6 Montgomery Co. Rep. 167 (1890); *North Manheim Twp. v. Reading & Pottsville R. R.*, 3 Bannard's Sup. Ct. Dig. 190 (1888).

² *Com. v. Pennsylvania R. R.*, 117 Pa. 637 (1888).

hundred feet, there is such a material impediment to the "passage or transportation of persons or property along the same" within the meaning of the Act of February 19, 1849, as will justify the court in continuing an injunction until the railroad company makes proper provision for the convenience of the public.¹

A street laid out by commissioners in the city of Chester, under an Act of February 14, 1866, P. L. 31, although unopened, is an established road, within the meaning of a general railroad law of 1849, and will require the railroad to be so constructed across it as not to impede the passage or transportation of persons or property.²

When the New Road must be Built.

186. A railroad is not obliged to construct a new road before changing the site of an old one.³ Where a railroad company is given the power to construct its railroad on a public road, provided that, if it should be necessary to change the public road, the company should "cause the same to be reconstructed in the most favorable location and in as perfect a manner as the original road," the company is not required to make the new road prior to occupying the old road. If, under the authority of such a law, a railroad company occupies a portion of a public road, it is not guilty of nuisance, although the public travel is obstructed on the portion occupied by the railroad.⁴

Where a railroad is located by survey on a public road, it is bound to reconstruct the highway in another location

¹ Stroudsburg Borough v. Wilkes-Barre & Eastern R. R., 12 Pa. C. C. R. 395 (1892).

² Chester v. Baltimore & Philadelphia R. R., 140 Pa. 275 (1891).

³ Lower Merion v. Philadelphia & Reading R. R., 5 Montgomery County Rep. 163 (1889); Ridley Township v. Baltimore & Philadelphia R. R., 2 Lancaster L. R. 375 (1885).

⁴ Danville, Hazelton & Wilkes Barre R. R. v. Commonwealth, 73 Pa. 29 (1873).

within a reasonable time, although the railroad itself is not actually built upon the public road until many years afterward.¹

Entrance to Old Road must be Closed.

187. If a railroad company occupy a public road and substitute a new one in its place, it must guard the public against danger of injury by closing up the entrance to the old road.²

Repair of Highway.

188. Where a railroad company is bound to repair a public highway and refuses to do so, the proper public officers, upon due notice to the corporation, may make the repairs and recover the amount thereof from the company in assumpsit.³

Repair of Bridge.

189. If a railroad company changes the bed of a public road in such a way as to render necessary the building of the bridge, which was otherwise not needed, the railroad company is bound not only to build the bridge, but keep it in repair, and rebuild it when necessary. "If it was necessary for it to build the bridge, it is just as necessary for it to rebuild when dilapidation and decay make rebuilding proper. The duty of the company, then, is obvious unless it is released therefrom by some Act of Assembly. But the Act of 1848, so far from relieving it of this obligation, recognizes and enforces it, for it requires the corporation, when it conceives it to be necessary to use a public road, 'to cause the same to be reconstructed forthwith, at its own proper expense, on the

¹Pittsburgh, Virginia & Charleston Rv. v. Com, 101 Pa. 192 (1882).

²Pittsburgh, Chartiers & Youghiogheny R. R. v. Moses, 17 W. N. C. 76 (1886).

³Penna. R. R. Co. v. Duquesne Borough, 46 Pa. 223 (1863).

most favorable location and in as perfect a manner as the original road.' The intention here manifestly is that no additional or unwonted burthen should be cast upon the public by the company's use of the old road; but the maintenance of a bridge is such a burthen, often a very heavy one, and such as the company, and not the municipality, should support."¹

Construction of New Road by County Authorities.

190. Where a road or bridge taken by a railroad company has not been replaced, the county commissioners may replace it, after notice to the company, and recover from the company the expense incurred.²

A railroad company appropriated a portion of a public road, removing a bridge in doing so. The company failed to rebuild the bridge, and the county commissioners let the work to a contractor, who began the erection of a new bridge. When the new structure was nearly completed, employees of the railroad tore it down, and drove the contractor from the work. There was evidence, though contradicted, that the superintendent of the railroad had assented to the location of the new bridge. It was held in an action of trespass by the contractor that it was for the jury to decide as to the authority and agreement of the superintendent.³

Acquiescence of Public Authorities.

191. Where there is a diversion of a public highway not justified by actual necessity, but merely to facilitate the erection of a bridge, if the public authorities stand by and permit the work to be finished at great expense

¹ *Pennsylvania R. R. v. Borough of Irwin*, 85 Pa. 336 (1877). Per GORDON,

² *Bean v. Howe*, 85 Pa. 260 (1877).

³ *Bean v. Howe*, 85 Pa. 260 (1877).

they cannot afterward compel the railroad company to restore the road to its original condition.¹

Release of Liability to Construct New Road.

192. A railroad company cannot assign its rights under the general railroad law to locate and construct a new public road in place of one appropriated by it to the township commissioners, and a release by the latter to the railroad company of its liability to construct such new road is void.²

Lessee of Railroad Must Reconstruct.

193. The lessee of a railroad is bound to reconstruct a public road which the lessor company has failed to do, and the lessee company may be indicted for failure to perform this duty.³

Owner of the Soil of the Road Entitled to Damages.

194. The authority in the general railroad law of 1849 to a railroad company to occupy a public road, if it supplies another road at its own expense, does not divest the right of the owner of the soil of the first road to recover damages from the railroad. And if the railroad company occupies the road without paying or securing damages the owner is entitled to recover the soil by an action of ejectment.⁴

Private Ways.

195. Ground occupied by a land-owner merely as a way in passing from one part of his farm to another, is not an established road or way which cannot be impeded

¹ Pottsgrove Township v. Pennsylvania Schuylkill Valley R. R., 2 Montgomery County L. Rep. 133 (1886).

² Snow v. Deerfield Township, 1 W. N. C. 382 (1875).

³ Com. v. Pennsylvania R. R., 117 Pa. 637 (1888).

⁴ Phillips v. Dunkirk, Warren & Pittsburgh R. R., 78 Pa. 177 (1875).

or obstructed by a railroad company. On a bill in equity to restrain a railroad company from impeding a way the master found that the alleged road was simply a way along a fence through several fields, across which were several sets of bars and on one side of which only was there a fence, and that the division between the fields, and that complainant, by turning out of the way about one hundred panels, could, by making use of a trestle, go under the railroad. The court refused an injunction, saying: "The ground used by appellant in passing from one part of his farm to another part thereof is not an 'established road or way' within the meaning of the 12th section of the Act of February 19, 1849. He has the same right to that ground as to every other part of his farm. He may change his way of passing thereon at will. No other person has any right or interest therein. It is a mere passage-way for the convenience of the owner of the land. Its use as such is not protected by any Act of Assembly nor by any prescriptive right. It results only from the ownership of the land and exists only during the will of the owner. This view, however, does not preclude the appellant from recovering all the damages which he may sustain by reason of the location and construction of the railroad on the property."¹

The owner of a private right of way over land which has been destroyed by a railroad company must recover his damages by the statutory proceeding, and cannot maintain a common-law action therefor.²

Remedies.

196. Mandamus is the appropriate proceeding to compel a railroad company to build a road in place of a public

¹ Ambler's Ap., 4 Atl. Rep. 187 (1886).

² Phillips v. St. Clair Incline Plane Co., 153 Pa. 230 (1893).

road occupied by the company. Supervisors of the township may apply for the writ, but the suit must be instituted in the county where the railroad company has its office and chief place of business.¹

A writ of mandamus should not be awarded on demurrer to compel a railroad to reconstruct a public road where the defendants, following the words of the petition, aver that they did reconstruct the road "located as set forth in the petition" in the most favorable location and in as perfect a manner as the original road.²

A railroad company, which enters upon and appropriates a portion of a road, which had formerly been a turnpike road, but which, owing to the forfeiture of the turnpike company's charter, had been abandoned by the turnpike company, though it continued to be used by the public, is bound to cause the said road to be reconstructed under the provisions of the Act of February 19, 1849 (P. L. 85), and, in case of refusal, will be compelled by mandamus so to do.³

It is unnecessary to procure the consent of the attorney-general to mandamus proceedings to compel a railroad company to reconstruct a public highway occupied by it to the injury of the public. The proceedings may be instituted on the relation of the road commissioners of the township where the road was situated. If the principal office of the railroad company is without the State, the writ may issue from the county where the company's works are situated, and may be served upon a director residing in an adjoining town.⁴

¹ Whitemarsh Twp. v. Phila., Ger. & Nor. R. R. Co., 8 Watts & Serg. 365 (1845).

² Buffalo, New York & Pittsburgh R. R. v. Commonwealth, 120 Pa. 537 (1888).

³ Pittsburgh, McKeesport & Youghiogheny R. R. v. Commonwealth of Pennsylvania *ex rel.* Attorney-General, 104 Pa. 583 (1883).

⁴ Commonwealth *ex rel.* v. New York, Pennsylvania & Ohio R. R., 138 Pa. 58 (1890).

The right which a railroad company has "for the settling and obtaining the right of way," does not apply to a dispute between the railroad company and township authorities in reference to a public road which the railroad company has occupied. The right in question applied to the acquisition of private property through condemnation proceeding.¹

Indictment for Obstructing Road.

197. An indictment will lie against a railroad company for obstructing a public highway in such a way as to cause serious inconvenience and danger to the public. Thus a railroad company may be indicted for constructing a mound two feet on one side and four feet on the other side above the natural line and level of a turnpike at the point of crossing.²

An indictment will lie against a railroad company for not reconstructing a public road which it had occupied with its tracks, but a sentence upon such an indictment can extend only to the imposition of a fine for failing to reconstruct the road within a reasonable time. The company cannot be compelled by the sentence either to remove the obstruction from the old road, or to construct a new one.³

¹ *Danville, Hazelton & Wilkes-Barre R. R. v. Commonwealth*, 73 Pa. 29 (1875).

² *Northern Central Ry. Co. v. Com.*, 90 Pa. 300 (1879); *North Manheim Twp. v. Reading & Pottsville R. R.*, 3 Bannard's Sup. Ct. Dig. 190 (1888).

³ *Pittsburgh, Virginia & Charleston Ry. v. Com.*, 101 Pa. 192 (1882).

CHAPTER XIII.

TAKING OF PROPERTY DEVOTED TO PUBLIC USE.

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| 198. The General Rule. | 206. Examples. |
| 199. What Property May be Taken. | 207. Crossing Yards. |
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Authority. |
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The General Rule.

198. Unless there is express authority to take property already dedicated to a public use a railroad company cannot condemn such property.¹

A franchise is property, and, as such, may be taken by a corporation having the right of eminent domain, but in favor of such right there can be no implication unless it arises from a necessity so absolute that, without it, the grant itself will be defeated. It must also be a necessity that arises from the very nature of things over which the corporation has no control; it must not be a necessity created by the company itself for its own convenience or for the sake of economy.²

The Pennsylvania Railroad Company was authorized

¹ *Cake v. Philadelphia & Erie R. R.*, 87 Pa. 307 (1878).

² *Pennsylvania R. R. Co.'s Ap.*, 93 Pa. 150 (1880).

in 1873 to lay a track on Delaware Avenue in the city of Philadelphia as far north as Dock Street, and to acquire such "ground and property near or convenient to said avenue or streets as said company may deem necessary for depot and other railroad purposes." The company constructed a depot on Dock Street beyond Delaware Avenue, and tore up the street railway tracks on Dock Street to reach the depot from their line on Delaware Avenue. It appeared that the company could have built their depot at the corner of Delaware Avenue and Dock Street and thus have avoided the necessity of using Dock Street. The court decided that the company had no right to interfere with the franchise of the street railway.¹

Where it is commercially impossible to construct and operate a telephone line and an electric railway on the same street at the same time, it is doubtful whether the telephone company has the superior right to the use of the street merely because its use was prior in time.²

A charter of a passenger railway company is a contract, and a subsequent charter to another company granting rights inconsistent with the former is invalid.³

Where in a bill for an injunction by a telephone company against an electric railway company whose line has been built, it is alleged by the plaintiff that it has an exclusive right to the use of the street, and that the operation of the railway will necessarily destroy its property and business, and this fact is denied by the defendant, a preliminary injunction will not be continued if the de-

¹ Pennsylvania R. R. Co.'s Ap., 93 Pa. 150 (1880).

² Central Pennsylvania Telephone & Supply Co. v. Wilkes-Barre & West Side Ry., 11 Pa. C. C. R. 417 (1892).

³ Second & Third Street Ry. v. Green & Coates Street Passenger Ry., 3 Phila. 430 (1859).

fendant enters security to pay all damages that may be awarded to the plaintiff.¹

What Property May be Taken.

199. The property of one railroad may be subjected to an easement in favor of another railroad, where the rights of the first company are not materially interfered with by the second company. Thus a railroad company was permitted to cross a strip of land upon which the owner, another railroad company, intended to build a branch. The decree was so framed that the crossing company was required to build its viaduct at such an elevation as to leave at least twenty-one clear feet between the lowest part of the bridge and the surface, and it was also required to build its abutments entirely upon its own land.²

If land is not in actual use by a railroad company, a preliminary injunction will not issue to restrain another company from constructing its railroad upon the land.³

A legislature has no power to authorize one railroad company to appropriate any premises of another railroad company which are necessary to the proper conduct of the business of the latter; but such lands or rights of way not necessary for the proper conduct of the business of a railroad may be taken for the use of another company.⁴

A railroad company chartered under a general railroad law may occupy a lot on a street, owned by another railroad company, if the lot is not in actual use.⁵

¹Central Pennsylvania Telephone & Supply Co. v. Wilkes-Barre & West Side Ry., 11 Pa. C. C. R. 417 (1892).

²Western Pennsylvania R. R. Co.'s Ap., 99 Pa. 155 (1881).

³Pennsylvania R. R. Co.'s Ap., 3 Walker, 454 (1882).

⁴Petition of Cleveland & Pittsburgh Railroad, 2 Pittsburgh Rep. 348 (1862).

⁵Philadelphia, Germantown & Norristown R. R. Co.'s Ap., 2 Walker, 291 (1884).

Turnpikes.

200. The legislature may grant to a railroad company the right to lay its tracks upon a turnpike, upon the railroad company paying to the turnpike company the compensation for the damages which it may incur by the construction of the railroad.¹ A necessity for such taking must, however, exist. Whether it is "reasonably practicable" to construct the railroad without interference with the turnpike, is the only test.²

Market-House.

201. A market-house owned by an incorporated company authorized to build and maintain a market on property to be acquired by purchase, and to rent stalls therein, and to sell the property whenever the company desire to quit business, is not appropriated to public use in such a sense that it cannot be taken by a railroad company for a station. THAYER, P. J., said: "Tried by any tests which can properly be applied to them, the plaintiffs are private corporations. They have not a single feature belonging to a public corporation. They maintain the market-houses they own, or not, at their option. They can sell them or rent them. Their property may be taken in execution, and sold, like that of any individual. They are not armed with any portion of the right of eminent domain. They owe no duty to the public which they are bound to fulfill, or which can be enforced by the public. The public has no legal rights of any nature in their property, nor any use therein which is recognized by law. They are not under any public authority; or subject to any public control; nor have the public any use in their property o

¹ Citizens' Passenger Railway Case, 2 Pittsburgh Rep. 10 (1859).

² Chestnut Hill & Springhouse Road Co. v. Pennsylvania R. R., 6 Montgomery County L. Rep. 105, 121 (1890).

any franchise which is secured by any law, or which can be enforced by any remedy. They are not liable to any public supervision, nor can they be made to respond to any public demands. Being, therefore, in every legal sense, mere private business corporations, with no public functions which they can be compelled to perform, and subject to no public use which can be enforced against them, there is nothing in their constitution, their nature, or their relations to the State or to the public which exempts their property from the exercise of the sovereign right of eminent domain. They stand in that respect upon the same level with every citizen in the commonwealth, and have no greater rights in this regard than any private individual whose property is needed by the State for public purposes."¹

Elevated Railroads.

202. An elevated railroad to carry passengers only cannot be erected on streets already occupied by street railways.

The Quaker City Elevated Railroad Company's proposed structure was a street passenger railway, and as such prohibited by the Acts of 1868 and 1869. Even if it were considered as a regular railroad, it was still unlawful, as the Act of 1868 did not authorize the erection of railroads upon city streets. It has no right, without express authority, to place on the city streets a railroad intended to carry street passengers from one portion of the city to another while those streets are already occupied by street passenger railways; and it did not claim to have any express authority for so doing.²

¹ Twelfth St. Market Co. v. P. & R. Terminal R. R., 142 Pa. 580 (1891), s. c. 10 Pa. C. C. R. 25.

² Potts v. Quaker City Elevated R. R., 12 Pa. C. C. R. 593 (1892).

Crossing of One Railroad by Another—Act of June 19, 1871.

203. The Act of June 19, 1871, P. L. 1361, relating to legal proceedings against corporations, provides that, "when such legal proceedings relate to crossings of lines of railroads by other railroads, it shall be the duty of the courts of equity of this commonwealth to ascertain and define, by their decree, the mode of such crossing which will inflict the least practical injury upon the rights of the company owning the road which is intended to be crossed; and if, in the judgment of such court, it is reasonably practicable to avoid a grade crossing, they shall by their process prevent a crossing at grade."¹

"The 1st section of the seventeenth article of the Constitution, which declares that 'every railroad company shall have the right with its road to intersect, connect with or cross any other railroad, and shall receive and transport each other's passengers, tonnage and cars, loaded or empty, without delay or discrimination,' does not change the policy of this State as embodied in the Act of June 19, 1871, P. L. 1360. The vital question in every case is, whether there shall be an intersection or grade crossing, or an overhead crossing. If the latter is found to be reasonably practicable, the former shall not be permitted. Either gives to the new road the right guaranteed to it by the Constitution. It is entitled to a

¹ Railroad companies, although chartered prior to the Act of June 19, 1871, regulating grade crossings, are subject to the act: *Pittsburgh & Connellsville R. R. v. South West Penna. Ry. Co.*, 77 Pa. 173 (1874).

The right to regulate railroad crossings lies in the police power of the State, and the State, in granting a charter to a railroad company, will not be presumed to have divested itself of such a right: *Pittsburgh & Connellsville R. R. v. South West Penna. Ry. Co.*, 77 Pa. 173 (1874).

A railroad chartered under Act of 1868 has not an absolute right to cross the line of an older railroad at grade. The Act of 1868 in this respect is modified by an Act of June 19, 1871, which confers upon courts of equity the power to ascertain and define the mode of such crossing: *Perry Co. R. R. Extension Co. v. Newport & Sherman's Valley R. R.*, 150 Pa. 193 (1892).

crossing, either at grade or overhead, but cannot claim both; and, in any event, it has a right to connect with the older road."¹

Purpose of the Act.

204. The intent of the Act of 1871 was to discourage grade crossings. Such crossings ought not to be permitted except in case of imperious necessity. "They admittedly involve great danger to life and property. In the earliest period of railroads this danger was overlooked, or, at least, disregarded. The desire of the people for this species of improvements, tended to close their eyes to the dangers involved. The traffic then upon railroads was comparatively light, and trains ran at long intervals. The rapid development of the country, the enormous growth in wealth, population, and business has materially changed the relations of the public and to each other. The result is that we now see railroad companies and municipalities spending enormous sums of money in correcting the defects of earlier railroad construction, and especially in avoiding grade crossings. We must, therefore, construe the Act of 1871 in accordance with our present surroundings."²

A court of equity is imperatively required to restrain by injunction the building of a grade crossing if in the judgment of the court it is reasonably practicable to avoid such crossing.³ The *prima facie* presumption is that a grade crossing can reasonably be avoided, and the burden of proving that it cannot is upon the company seeking to

¹ Northern Central Ry. Co.'s Ap., 103 Pa. 621 (1883); Perry Co. R. R., etc., v. Newport & Sherman's Valley R. R., 150 Pa. 193 (1892).

² Perry Co. R. R. Extension Co. v. Newport & Sherman's Valley R. R., 150 Pa. 193 (1892).

³ Baltimore & Cumberland Valley R. R. Extension Co.'s Ap., 10 W. N. C. 530 (1881).

cross.¹ But if it appears that a proposed grade crossing is essentially necessary for the successful and proper operation of the crossing company's road and does not seriously injure the other company, and it is also not reasonably practicable to avoid the crossing at grade, and the municipal authorities consent, a decree permitting the crossing will be entered.²

Regulation of Crossings.

205. The practicability of an overhead crossing depends almost entirely on the circumstances of each particular case. It is always a question of fact, or rather a conclusion drawn from a variety of independent facts and circumstances. The location and surroundings of the proposed crossing, the character of the railroad and the uses made and intended to be made by them, the increased cost and expense of construction and operation, the public safety and convenience, the interests and convenience of the road intended to be crossed, are some of the factors that enter into the solution of the question of the reasonableness of an overhead crossing. What is reasonable is that which ordinary persons acquainted with the business would have anticipated as likely to be required, namely, that which has usually been done by discreet and intelligent persons under similar circumstances.³

¹ *Moosic Mountain Coal Co. v. Delaware, Lackawanna & Western R. R.*, 4 C. P. Rep. 189 (1887).

² *Pennsylvania R. R. Co.'s Ap.*, 116 Pa. 55 (1887).

³ *Northern Central R. R. Co.'s Ap.*, 103 Pa. 621 (1883). An interesting form of decree regulating a crossing at grade was entered in a case decided in 1883. The decree was as follows:

"1st. That injunction prayed for be refused.

"2d. That the defendant company shall have the right to construct and operate its railroad across the roadway and tracks of the plaintiff companies at grade, and over its adjoining land on the location proposed by the former company, and also to connect with the plaintiff companies' road at or near said grade crossing,

Examples

206. On a bill for a grade crossing the master found (1) that the plaintiff and defendant were vested with lawful

but subject to the payment when hereafter legally ascertained of such damages as the plaintiff company may thereby sustain.

" 3d. That such crossing must be constructed by the defendant company at its own cost, under the supervision of the chief engineer of the plaintiff company or an agent duly authorized by him, within the period of one week after demand made by defendant company.

" 4th. The said crossing and connection shall, if such connection shall be made, be kept in good condition, and the expense of repairing and renewing the same or any part thereof shall be borne by the defendant company. The chief engineer of the Philadelphia & Reading Railroad Company, or his duly authorized agent, shall have the right to say when and in what manner or to what extent repairs or renewals shall be made, and may at his option have the said repairs or renewals done at the expense of the defendant company, and in such case the last-mentioned company shall pay the expense thus incurred to the party or company then in possession of the Catawissa Railroad.

" 5th. The defendant company shall erect and maintain a signal-tower at or near the said crossing, provided with suitable signal apparatus, and shall keep a competent and careful watchman or more, if necessary, there at all times, whose duty it shall be to guard the said crossing and connection by proper signals.

" The place at and the manner in which the said signal-tower and apparatus shall be erected and maintained shall be determined by the chief engineer of the Philadelphia & Reading Railroad Company or his duly authorized agent. The first cost and expense of erecting and equipping the said watch-tower, and all subsequent expenses of maintaining the tower and its equipment in good condition, shall be borne by the defendant company. The wages of the watchman at the signal-tower shall be paid by the defendant company, and the said company shall be responsible for his acts or omissions.

" 6th. If the site of said signal-tower shall occupy any of the roadway of the plaintiff companies the damages for such occupation shall be assessed according to law, unless agreed upon by the parties, and shall be paid by the defendant company.

" 7th. In the use or working of the Catawissa Railroad and the railroad of the defendant company at or near the points of crossing or connection, trains, engines, or cars of the defendant company shall come to a full stop at a distance of at least two hundred feet from the point of connection or the point of crossing, as the case may be, and shall not proceed until the proper signals shall have been given by the watchman in charge, and in moving from the point of stoppage the speed of such trains, engines, or cars shall not exceed four miles per hour until the crossing or connection shall have been passed.

" 8th. In case the plaintiff companies, or either of them or their successors, while in charge of the Catawissa Railroad shall at any time determine to add another rail or other rails to the said railroad, the said crossing or connection

authority for the construction, maintenance, and operation of their respective roads in the city, intersecting at the points mentioned in the bill and answer; (2) that the business to be carried on over the road was mainly freight traffic; (3) that it was essential to a profitable operation of plaintiff's road that it be built as near as possible to the natural surface grade of the land so as to afford property-owners along its line practical facilities for connecting therewith by sidings, turn-outs, etc.; (4) that the avoidance of grade crossings by the plaintiff, and the construction of the road at certain points depressed and at others elevated, as suggested by the defendant, would deprive plaintiff of the facilities for connection with properties along its line essential to its successful and profitable operation, and would render the road comparatively useless and profitless; (5) that the expense of construction of plaintiff's road in accordance with defendant's plan would be quite three times as great as that required for its construction in accordance with that of the plaintiff with crossings at grade; (6) that the construction and operation of the plaintiff's line, in accordance with its plan as a surface road crossing defendant's road at grade at the four points mentioned, would not seriously injure the defendant, although it would somewhat impede or delay the movement of its trains, but not to an extent

shall not prevent their doing so, and all additional expense incurred in consequence of the existence of said crossing or connection, or either, shall be paid by the defendant company at the time in possession of said Catawissa Railroad.

"9th. That either party may, upon ten days' written notice to be served upon any of the officers of the other company, apply to the court, if in session, or to the president judge at chambers, for such addition to, or modification of, these regulations as experience or observation may show the safety of persons or property seem to require.

"10th. That the bill of plaintiff be dismissed, and that one-half the costs be paid by the Philadelphia & Reading Railroad Company and one-half by the North & West Branch Railway Company:" *Catawissa R. R. Co.'s Ap.*, 2 Walker, 175 (1883).

which warranted the imposition of the enormous increase of cost of construction which the plan submitted by the defendant would call for. It was held that the plaintiff was entitled to a decree permitting the grade crossing.¹

On an application for an overhead crossing, the court found that it would cost from \$300,000 to \$600,000 more than a grade crossing, viz.: with embankment on level grade, without retaining wall, would cost \$350,000 more; with embankment and retaining wall, on level grade \$600,000 more; with an adverse grade of twenty-eight feet to the mile for thirty-five hundred feet east of the crossing, \$300,000 more; and with embankment, supported by retaining wall, with same adverse grade, \$400,000 more. That to do the work in the same permanent and substantial manner that it has been done on the other part of appellee's railroad in the immediate vicinity of the proposed crossing, taking into consideration everything except damages for right of way, would cost about \$150,000 more for an overhead than for a grade crossing; and that the damages for right of way be from \$40,000 to \$50,000. That immediately over appellant's road an elevation of about twenty feet would be required; between that and the bridge the elevated road would be, in places, as high as the eaves of the houses, and its passenger depot would be about thirty-two feet above the surface of the ground. If the road is carried over a deck bridge, there could be no use made of the main line of the road by means of sidings, within the borough, to accommodate manufactories, nor could there be a depot for freight purposes in connection with the road, except by means of a spur siding to commence east of the town and run along the surface to such depot in the manner described by one of appellant's witnesses. That the con-

¹Pennsylvania R. R. Co.'s Ap., 116 Pa. 55 (1887).

struction of an overhead crossing and elevated approach to the bridge, either by means of embankment or trestles would be prejudicial to the interests of the borough through which the road passes. That extending the grade of twenty-eight feet to the mile the distance of thirty-five hundred feet would be some disadvantage, but the road could not be as easily and profitably worked as if it had the same grade for only a distance of twelve hundred and fifty feet, notwithstanding the trains would have to come to a stop. That by means of signals located at proper points for the protection of both roads, all trains on the plaintiff's road being required to come to a full stop at least two hundred feet from the point of crossing, and not to proceed until the proper signal for the purpose shall have been given by the watchman in charge, the danger of collisions will be very slight. The court held that the facts were not sufficient to justify a decree for an overhead crossing.¹

The evidence showed that the younger company might have located its railroad upon a reasonably inexpensive and practicable route south of the older company's road. The cost of the relocation of the road upon this route, involving the tearing up and abandoning of a portion of the track, already built, would have cost about \$20,000. It also appeared that, if constructed upon this route, it would have reached all the objective points, and have obtained all the business that it would have secured upon the line adopted. It was held that the evidence did not justify the court in permitting the grade crossing to be made.²

In a case where a grade crossing was found impracticable, iron columns were allowed to be placed upon the right

¹ Northern Central R. R. Co.'s Ap., 103 Pa. 621 (1883).

² Perry Co. R. R. Extension v. Newport & Sherman's Valley R. R., 150 Pa. 195 (1892).

of way of the older company in order to support an overhead bridge of the crossing company, it appearing that the erection of the bridge without the columns would have cost \$75,000 more.¹

A railroad company located a branch across defendants' railroad to a manufacturing establishment. After condemnation proceedings the plaintiff filed a bill in equity for an injunction to restrain defendants from obstructing the construction of the grade crossing. The court refused a preliminary injunction, but allowed plaintiff, on filing a bond to secure defendants from loss, "to construct a temporary crossing to be used only for construction purposes." The Supreme Court refused to disturb the decree, as it appeared that no irreparable mischief could be done to defendants until final hearing.²

The court, under the Act of June 19, 1871, may make a mandatory order relative to grade crossings of railroads on a preliminary hearing. In an early case under the act the court decreed as follows: "That the defendants, the Catawissa Railroad Company, shall be permitted to cross the complainants' road at the several crossings now put in, or constructed with all their trains of cars, on agreeing to maintain a watchman at each of said crossings, at all times, when the trains on their road are passing, and that each and every train shall come to a full stop before crossing the complainants' road, and then pass over at a rate of speed not exceeding four miles an hour."³

Two railroad companies whose lines crossed each other executed an agreement in writing which provided as follows: "In the use or working of the railroads of the parties hereto at or near the point of crossing, all trains,

¹ Philadelphia & Reading R. R. Co.'s Ap., 2 Walker, 243 (1884).

² Pennsylvania Schuylkill Valley R. R. v. Philadelphia & Reading R. R., 151 Pa. 402 (1892).

³ Philadelphia & Erie R. R. v. Catawissa R. R., 1 Walker, 81 (1871).

engines, or cars of the party of the second part shall come to a full stop at a distance of at least two hundred feet from the point of crossing, and shall not proceed until the proper signal shall have been given by the watchman in charge. All the engines and trains of the party of the first part shall have priority of passage over the trains and engines of the party of the second part, but no unnecessary detention shall be caused to the trains of either of the parties, nor shall said crossing be blocked by either party." It was held that the agreement gave priority of passage to *all* engines and trains of the first party over the trains and engines of the second party. It was also held that a court of equity had jurisdiction to enforce such an agreement.¹

The fact that the capital of the latter company is small, and that the overhead crossing will require more money than its means would permit, is not sufficient to justify a grade crossing. A railroad company will not be permitted to interfere with the franchises of another railroad company, merely to avoid expense.²

Plaintiffs, by their bill, alleged that defendants proposed and threatened to cross plaintiffs' line of railway by an overhead bridge, and by building piers and abutments on their right of way without first having obtained a decree of court under the Act of June 19, 1871. Defendants did not deny these allegations, but offered to secure plaintiffs' damages by a bond. Held, that an injunction would be granted to restrain the defendants' proposed action, until after decree made. WEAND, J., said: "To restrain such threatened invasion of their rights, the plaintiffs are entitled to an injunction. The question as

¹ Cornwall & Lebanon Railroad Company, 125 Pa. 232 (1889).

² Perry Co. R. R. Extension Co. v. Newport & Sherman's Valley R. R., 150 Pa. 193 (1892).

to whether one railroad can condemn the property, franchise, or right of way of another company is not before us in this proceeding. The bill alleges an effort to obtain a crossing in a manner not contemplated by the Act of Assembly, there not having been a decree of this court for that purpose and none having been asked for by defendants, and praying that defendants may be restrained until such decree is made.

"In this matter the plaintiffs do not question the right of defendants to make a crossing; and, indeed, their prayer is only that an injunction may issue until the court makes a decree for that purpose; and it was admitted, on the argument, that all the necessary testimony and data to enlighten the court was contained in the affidavits, plans, drafts, and papers filed in the case. In the interests of the public and the parties, it is therefore to be regretted that we cannot now pass upon the merits of the case and proceed to final decree as though there had been an answer filed and the same testimony retaken. Litigation of this kind is not to be commended where the only result is delay; and we therefore throw out the suggestion that the parties, by paper filed, agree that the court may, without further pleadings, proceed to make a final decree upon the evidence before us and the argument already had. Indeed, it was suggested at the argument that we might do so; but, unfortunately, the record is not in proper shape to permit such action."¹

The rights of the first occupant of the ground are superior to those of the new claimant. The clear intent of the act is that no unnecessary injury shall be perpetrated on the road sought to be crossed.²

¹ Philadelphia & Reading R. R. v. Pennsylvania Schuylkill Valley R. R., 7 Pa. C. C. R. 491 (1889). See, also, Reynoldsville & Falls Creek R. R. v. Buffalo, Rochester & Pittsburgh Ry., 134 Pa. 541 (1890).

² Pittsburgh & Connellsville R. R. v. South West Penna. Ry. Co., 77 Pa. 173 (1874).

The crossing at grade of one railroad by another will not be permitted where it will seriously interfere with the convenient use and occupation of the shops already occupied by the company first occupying the ground, and will prevent the erection of the other buildings necessary for the proper exercise of its franchises, and it is reasonably practicable for the second road to adopt another suitable location for crossing the road of the first company on a shorter line.¹

Crossing Yards.

207. The Act of June 19, 1871, does not apply where one company seeks to run its line through the yard of another company, and to cross the yard tracks and switches of the older company as mere incidents to the use of its main line.²

The Sharpsville Railroad Company located a branch of its road through the yard of the Sharon Railway and filed its bond in the usual manner to secure the damages. The plans and exhibits showed that the primary object of the Sharpsville Railroad Company was to appropriate the Sharon Railroad Company's land, and that the crossing was a mere incident. PAXSON, J., said: "The equitable powers of the Court of Common Pleas, as conferred by the 2d section of the Act of June 19, 1871, in regard to railroad crossings, cannot be invoked in such a case as this. By a railroad crossing within that act is meant such a crossing only as appropriates no part of the land of the company whose track is to be crossed, to the exclusive use of the company seeking to cross. The question before the master and the court below was whether

¹ Pittsburgh & Connellsville R. R. v. South West Pennsylvania Ry. Co., 77 Pa. 173 (1874).

² Pittsburgh Junction Railroad Company's Ap., 122 Pa. 511 (1886).

the appellee had the right, for its own convenience and benefit, to appropriate a considerable portion of the yard of the appellant. It is true the prayer for relief in the plaintiff's bill is in the alternative; that if the defendant cannot be restrained from constructing its road through plaintiff's yard, that the court may, by its decree, define the terms and conditions upon which said defendant may be permitted to cross. It is also true that the plaintiff offered evidence before the master that a line could be made that would do less injury to plaintiff than the route indicated. This, however, was in rebuttal of defendant's evidence tending to show that the route proposed was the only one reasonably practicable. Besides, the alternative prayer referred to a crossing merely, and not to an appropriation of its yard.

"The land in question was acquired by the appellant company in entire good faith several years before this controversy commenced, for the purpose of a yard. I do not understand this fact to be disputed. It is true the learned judge below was of opinion that portions of the tracks in this yard were not constructed until about the time this bill was filed and that 'the primary purpose in their construction was to obstruct the building of defendant's branch.' We cannot adopt this finding in the sense in which the court below put it. The delay in building these tracks is accounted for by the poverty of the company. The master distinctly finds the fact that the land was acquired by appellant in 1874 and 1875, 'for the purpose and with the intent of locating its distributing yard there for the accommodation of the business of its road and branches; and the land so acquired is conveniently located, well suited, and necessary, to enable the plaintiff company to economically and expeditiously carry on its present and prospective business.' Under

such circumstance the precise time when its tracks in the yard were laid is not material.

"We have then the finding of the master, based upon ample testimony, that the land in question was acquired by the appellant company for the uses of its road, and that the same is necessary therefor. Can it now be taken by another company for the same or a similar use? It certainly cannot be done for the mere convenience or profit of the latter. To justify such taking there must be a necessity; 'a necessity so absolute that without it the grant itself will be defeated. It must also be a necessity that arises from the very nature of things over which the corporation has no control; it must not be created by the company itself for its own convenience or for the sake of economy.' Pennsylvania R. R. Co.'s Ap., 93 Pa. 150. To the same effect is Pittsburgh Junction Railroad Co.'s Ap. I will not stop to discuss or vindicate this rule. It is settled law, and rests upon sound principles. The cases of Appeal of Western Penna. R. R. Co., 99 Pa. 155, and Northern Central Ry. Co.'s Ap., 103 Pa. 621, have no application. They were cases of grade crossings under the Act of 1871.

"If there is any absolute necessity for the appropriation of plaintiff's yard by the defendant company it has not been shown. Certainly its failure to so appropriate it will not defeat its grant or the purpose for which it was chartered. The master finds: 'We have already seen that defendant company has constructed the railroad contemplated at the time its charter was obtained, from a point of connection with the plaintiff company in the borough of Sharpsville to Wilmington Junction in Lawrence County. There is no necessity, therefore, to prevent a failure of its chartered purposes, that it should be allowed to take complainant's land. The only purpose

it has in view in desiring to construct a branch to Sharon is that it may carry its own freight to and from the Sharon furnaces, and the furnaces of Boyce, Rawle & Co., instead of receiving it from or returning it over to the plaintiff company as the case may be.'

"Granted that the defendant company has the power to build this branch, and that the same would be convenient and even profitable, it cannot be said that its construction was the primary purpose for which it was chartered, or that its failure to do so will destroy its grant. The branch is but an incident to the main object of the company, and it cannot pursue the incident to the destruction of the rights of other parties. Land once appropriated by a railroad company to public use under the right of eminent domain cannot afterward be appropriated by another company to the same use excepting in a case of absolute necessity. Such necessity does not appear in this case."¹

A railroad company will not be permitted to cross with its tracks at grade the yard of another company merely for the sake of convenience or to save expense; but an overhead crossing of a yard will be permitted where the crossing is absolutely necessary to the company building the new road, and will impose upon the company owning the yard only a trifling injury, which may be compensated in damages. In such a case PAXSON, C. J., said: "In the case at hand the plaintiff seeks to cross defendants' yard, not at grade, but by an elevated road which will occupy no portion of the yard except from its necessary supports. That it will occasion some inconvenience to the defendants is probable, but for that it can be compensated in damages. It will certainly do them less injury than by any other form. While vested rights are to be sacredly guarded, the public interests must not be overlooked, and nothing

¹Sharon Ry. Co.'s Ap., 122 Pa. 533 (1888).

in the way of mere construction can be permitted to interfere with the public convenience. In the present case we have the facts found by the master and approved by the court as follows: 'This road goes through the defendants' extensive freight yard at its least valuable part, and in such a way as to take but a trifle of the defendants' land, and so as not to any considerable degree restrict or embarrass any of the defendants' use or enjoyment, now or in the future, of said yard for any of the purposes to which it is applied or for which it is held.' The occupation of the yard as proposed will cause some inconvenience and interference with the defendants' operation and use of the yard, but not to any considerable or serious degree, nor lessen to any appreciable extent the capacity of its accommodation for the defendants' use. 'The entire injury to the defendants would comparatively be inconsiderable and could be easily compensated for in damages.' 'The plaintiff cannot, by any other route whatsoever, reach its terminus at Eleventh and Ninth Streets.' These findings were fully sustained by the court below as warranted by the evidence. Giving to them the weight of a verdict, it will readily be seen how entirely this case differed from those cited. Railroad corporations are the creatures of the public, and were created to serve the public in the matter of transportation of freight and passengers. It is not too much to require them to submit to a slight inconvenience where the public interests are concerned, especially where such inconveniences can be compensated in damages. Their franchises, like other property, may be taken by the public for the public welfare, where there exists a necessity for such taking. We have interfered repeatedly where such an attempt has been made without any actual necessity therefor. In the case in hand we think such necessity does exist, and the slight inconvenience

nience to the defendant company must be to the public good."¹

Electric Railway Crossings.

208. The Act of June 19, 1871, P. L. 1360, applies to street electric railways constructed under the Act of May 14, 1889, P. L. 211.²

The purpose of the Act of 1871 was not merely to discourage grade crossings because of their danger to the public, as well as injury to the company whose road is crossed, but also to prevent them whenever in the judgment of the court it is reasonably practicable to avoid such dangerous and injurious crossings. In a case where the court enjoined the construction of a grade crossing by an electric railway over a steam railroad where the proposed crossing was exceedingly dangerous in character Justice STERRETT said: "It is impossible to consider the testimony in this case, in connection with the statement of facts agreed upon by counsel, without being forced to the conclusion that the crossing in question is one of those death traps which should not be permitted to exist in any community. One of the witnesses, whose large and varied experience as a railroad superintendent entitles his opinion to great weight, says: 'My own judgment in regard to a street crossing, either by horses, electricity, or cable, is that any one attempting such a crossing at camp Copeland is no less guilty than a man who would in cold blood murder his fellow-being. . . . I mean by that, what I have said to these people, that no

¹ Pittsburgh Junction R. R. v. Allegheny Valley R. R., 146 Pa. 297 (1892).

² Pennsylvania R. R. v. Braddock Electric Ry., 152 Pa. 116 (1892); 11 Pa. C. C. R. 163 (1891); Delaware, Lackawanna & Western R. R. v. Wilkes-Barre & West Side Ry., 11 Pa. C. C. R. 165 (1891). See Du Bois Traction Pass. Ry. Co. v. Buffalo, Rochester & Pittsburgh Ry., 10 Pa. C. C. R. 401 (1891).

power on earth, nor any arrangement, nor any mechanical, electrical, or other device that I am personally aware of at present, can prevent the loss of life.' Again speaking of electric roads, he further testifies: 'I can say from personal observation that an electric street railroad is the most dangerous of all street car railroads, from the fact that there are two parties in control, the motorman in front with his electricity and the conductor in the rear with his trolley—and unless they both act in unison and fully understand what each other desires to do, trouble ensues. A conductor on the rear end of the car can place the motorman entirely helpless. In crossing the railroad at such points as Copeland there is great danger—as I have personally noticed in Pittsburgh—of their trolley being disconnected and the car stopping.'

"Without further reference to the testimony, it is sufficient to say that the very frequent and rapid passage, to and fro, of trains on the four tracks of plaintiff's road (over two hundred daily between six o'clock, A. M., and midnight), the descending grade and curvature of said tracks, obstructed view, in short, all the environments of the crossing, co-operate in making it exceedingly perilous, so exceptionally dangerous, indeed, that it is surprising the directors of defendant company are willing to imperil the lives and limbs of their patrons by attempting to cross at grade.

"It is conceded that the topography of the vicinity is such that, at First Street, about seven hundred feet west of defendant's road, it would be practicable to cross plaintiff's tracks by means of a substantial overhead viaduct or bridge, spanning plaintiff's right of way and costing from \$6,000 to \$7,000, exclusive of approaches on the south side; that, 'a short distance east of the said road, a crossing, beneath plaintiff's tracks, is also practicable,

but at considerably greater cost, and in part through private property.'"¹

An electric railway has the right to cross the tracks of a steam railroad at grade, but the former must adopt such regulations as to the structure of its road and management of its cars at the place of crossing as will afford the greatest protection to the public.²

On a bill filed by a steam railroad company against an electric passenger railway company, the defendant company was permitted to construct and operate its electric railway across the tracks of the steam railway at grade, subject to the following regulations and conditions: (1) The defendant company shall elevate its electric wire at said crossing at least twenty feet and six inches above the level of the plaintiff's rails. (2) In laying its rails the defendant company shall not cut the rails of the plaintiff company or interfere with travel on said railroad, and shall, at all times, keep the crossing so constructed in good repair. (3) The defendant company shall pay to the plaintiff company the difference between the value of the single-arm gates at present in use at said crossing and the cost of double-arm gates to take their place. (4) Each car operated by the defendant company shall be brought to a full stop at said crossing and shall not cross until signaled so to do by the conductor thereof, who shall first go ahead to said crossing and be on the lookout for approaching trains, cars, and locomotives.³

Where, upon application for an injunction by a steam railroad company to prevent an electric railway company from crossing the railroad company's tracks at grade, it

¹ *Pennsylvania R. R. v. Braddock Electric Ry.*, 152 Pa. 116 (1892).

² *Pennsylvania R. R. v. Suburban Rapid Transit Co.*, 11 Pa. C. C. R. 591 (1892).

³ *Delaware, Lackawanna & Western R. R. v. Wilkes-Barre & West Side Ry.*, 11 Pa. C. C. R. 165 (1891).

appears that it is practicable for the electric company's cars to be brought to a full stop before crossing the tracks, and the defendant company undertakes thus to stop its cars and have its conductors go forward to the railroad tracks before attempting to cross, a preliminary injunction will be refused.¹

Security for Damages.

209. The court will not, on motion, and before hearing and decree, approve a bond to secure damages sustained by one railroad crossing another. WEAND, J., said: "We think the act is clear and positive in its terms, and that the petitioners must be driven to their proceeding in a court of equity in order that the court may, after proper investigation, by their decree, ascertain and define the mode of such crossings which will inflict the least possible injury, etc. By the 'mode of such crossing,' was evidently meant not only whether at grade, above grade, or below grade, but also whether by piers, abutments, or single span bridges, etc.

"In ordinary cases the object of approving the bond is not only to secure the owner in his damages, but also to enable the parties giving it to at once proceed with their work. On giving security, the right of way vests in the company: *Philadelphia & Reading R. R. v. Lawrence*, 10 Phila. 604. 'And the land-owner must look to the bond for his damages. The security being given in due course of law, the grasp of the owner upon his property is loosened by the Constitution itself.' *Fries v. Southern Pa. R. R. & Mining Co.*, 85 Pa. 73. We do not mean to rule that such would be the effect of an approval of this bond, but, lest we place the crossed com-

¹ *Pennsylvania R. R. v. Suburban Rapid Transit Co.*, 11 Pa. C. C. R. 591 (1892).

pany in that position, we ought to hesitate. Again, how are we to fix any amount or term of a bond until we first know how the complaining corporation is to be affected, there being no date upon which an estimate can be based, prior to a decree? Reading the Act of 1871 in this light, we conclude that the proper proceeding is by bill or petition, in equity, to determine the mode of crossing, as was done in the case of the Pittsburgh & Connellsville R. R. Co. *v.* The South West Penna. Railway Co., 77 Pa. 173."¹

Proceedings Must be Under the Act to Give Equity Jurisdiction.

210. The court will not grant an injunction to restrain interference with the proposed crossing, when the proceeding is not begun under the Act of 1871, and the bill contains no prayer for general relief. WEAND, J., said: "The bill in this case sets forth that the 'plaintiff has located its line of branch railroad in the township of Lower Merion, and is about to engage in the work of constructing the same, and that the said line of location and proposed construction crosses the railroad of said defendant overhead, etc.,' the manner of crossing by piers and abutments being particularly set forth in the bill and accompanying draft; that plaintiff has endeavored to agree with the defendant as to mode of construction, and the defendant refused to enter into negotiations; that a bond has been tendered and refused, and that the approval of said bond is depending before the court. This approval has been withheld in an opinion just filed. The only relief asked for is that an injunction may

¹ Philadelphia & Reading R. R. *v.* Pennsylvania Schuylkill Valley R. R., 7 Pa. C. C. R. 381 (1889). See Philadelphia & Reading R. R. *v.* Berks County, 2 Woodward, 361 (1873).

issue restraining the defendant from obstructing or interfering with the said plaintiff in the work of constructing the piers, bridges, and superstructures for crossing said defendant's road. There is no prayer for general relief.

"Before we can grant the relief prayed for the plaintiff must show that it is engaged in a lawful undertaking. If it has no authority to do the act proposed, it is a wrong-doer and not entitled to protection by injunction.

"The bill sets forth a proposed crossing of defendant's road; and under section 2 of the Act of June 19, 1871, P. L. 1360, the mode of crossing is to be fixed by a court of equity. There is no averment in the bill that this has ever been done, and the answer of defendants denies such action by this court. The bill does not ask for an approval of the plaintiff's method of crossing, except as implied by an injunction; nor are we asked to fix, by our decree, the relative rights of the parties in the matter, and there is nothing in the bill as it now stands that would confer this power upon us. It follows, then, that the plaintiff has arbitrarily, and of its own motion, fixed and determined the mode of crossing to which the defendant objects; and, this being so, the plaintiff can secure no rights in the matter, except in the manner indicated by the Act of 1871. We are simply asked to sanction an act which is without authority of law, by restraining defendants in the protection of their property. It is clear that we cannot issue the injunction prayed for, and hence it must be refused. To grant it now would be, impliedly, at least, ratifying the acts of plaintiff before final decree. It is claimed that in the case of the Balt. & Phila. R. R. v. P., W. & B. R. R. (17 Phila. 396), in the Common Pleas of Philadelphia, a similar bill was filed, and that the court made a decree determining the mode of cross-

ing. We are not informed whether the same objections were made in that case as in this, but, on reference to the bill, we find that there was a prayer for general relief, upon which it is probable the court acted."¹

Crossing Company Must Show Its Authority.

211. Under the Act of June 19, 1871, a railroad whose line is about to be crossed by another railroad, has the right to call upon the crossing company to show by its charter that it has the power to do what it proposes to do, and it may also be shown from the same instrument that powers once possessed have been forfeited by lapse of time or otherwise, but there is no warrant in the act for a wider investigation into causes of forfeiture than those which may appear merely from the conditions and limitations of the charter. Thus in an equity proceeding under the Act of 1871, forfeiture by mere non-user of the franchise cannot be proved.²

Defenses.

212. On a bill in equity under the Act of 1871, to restrain a railroad company from crossing the tracks of the complainant at grade the complainant cannot avail itself of the fact that the defendants have, by their laches, allowed a third company to build its tracks over that portion of the chartered route of the defendants, intended to be occupied by them after making said crossing.³

¹ *Pennsylvania Schuylkill Valley R. R. v. Philadelphia & Reading R. R.*, 7 Pa. C. C. R. 490 (1889).

² *Western Pennsylvania R. R. Co.'s Ap.*, 104 Pa. 399 (1883).

³ *Western Pennsylvania R. R. Co.'s Ap.*, 104 Pa. 399 (1883).

CHAPTER XIV.

TAKING OF DWELLING-HOUSE AND PLACE OF WORSHIP.

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| 213. Dwelling-House Includes Curtilage. | 215. Occupancy of Dwelling to Prevent Condemnation. |
| 214. Where Dwelling-House is on Town Lot. | 216. Place of Worship. |

Dwelling-House Includes Curtilage.

213. The Act of February 14, 1849, prohibiting a railroad company from passing through any dwelling-house, does not mean that the prohibition extends only to preventing the railroad from actually passing "through" the dwelling-house. When the latter is occupied by the owner thereof, the statute gives it all the protection necessary for its reasonable enjoyment as a dwelling for the owner and his family. This necessarily includes some curtilage connected therewith. The exact extent of that curtilage cannot be defined by any arbitrary rule as to distance. As each case arises the right of the owner and occupier of the dwelling-house, against hostile location of a railroad, must be determined by a consideration of what is necessary for a reasonable and proper enjoyment of the house as a residence in view of its location and surroundings.¹

¹Swift & Given's Ap., 111 Pa. 516 (1886); *Damon v. Baltimore & Philadelphia R. R.*, 2 Lancaster L. R. 401 (1885).

In the absence of constitutional or statutory provision to the contrary, the right to enter upon land includes the right to remove a dwelling-house. The word land in such a case must be taken in its technical sense as including everything fixed to the ground: *Brocket v. Ohio & Pennsylvania R. R. Co.*, 14 Pa. 241 (1850).

Where Dwelling-House is on Town Lot.

214. A mere strip from the rear end of a town lot on which a dwelling-house is built, may be taken if access to the lot for the carrying of supplies can still be had from the front.¹

The land taken by a railroad company was one corner of the rear end of a lot one hundred and fifty-five feet from the nearest portion of the dwelling-house built upon the lot. The railroad did not interfere with the use or enjoyment of adjacent out-buildings or ornamental structures, nor with any shrubbery or lawn. It did not prevent access to the street nor cause any substantial objection to the occupancy of the building as a dwelling-house. It was held that the company could not be enjoined from taking the land proposed.²

An injunction will not be granted to restrain a railroad company from occupying a strip of land, on the ground that the proposed road passes through a dwelling-house within the meaning of the Act of February 19, 1849, § 10, where it appears that the strip to be appropriated, cuts off the site of a borough lot one hundred and twenty by one hundred and thirty-two feet of the corner of a dwelling-house on the lot, but in such a manner as not to interfere with the free and easy access to the house and with the curtilage necessary to its use and enjoyment.³

Plaintiff owned a town lot forty feet by one hundred and twenty feet. A dwelling-house was built upon the lot in 1869, and a stable upon the rear end of lot in 1885. The railroad proposed to cut off a strip from the rear of the lot, taking the whole or a portion of the stable. It was held that the company had a right to do so.⁴

¹ *Lyle v. McKeesport & Belle Vernon R. R.*, 131 Pa. 437 (1890).

² *Swift & Given's Ap.*, 111 Pa. 516 (1886).

³ *Church v. Dobbins*, 12 Pa. C. C. R. 375 (1892).

⁴ *Kelly v. Philadelphia & Reading R. R.*, 7 Montgomery County L. Rep. 29 (1891).

Land taken by a railroad company was more than one hundred feet distant from a dwelling-house, and not within the same inclosure. Access to the building was not materially interfered with. No out-buildings were taken, and the barn was not cut off from the dwelling. A bill for an injunction was dismissed.¹

Occupancy of Dwelling to Prevent Condemnation.

215. Where a testatrix gives her residuary estate, including a dwelling-house proposed to be taken by a railroad company, to her executors to sell and pay legatees for life, the legatees cannot by moving into the dwelling-house after the death of the testatrix prevent the railroad company from taking the house.²

The owner of a dwelling-house in the occupancy of a tenant cannot, after a railroad has been located through the house and the location has been approved by the directors of the company, prevent the company from taking the house by removing the tenant and occupying the house himself.³

Place of Worship.

216. Under the Acts of April 23 and August 12, 1864, a railroad company may tunnel under a lot common both to a church building and its parsonage, upon the payment of damages. In *Penn. R. R. Co. v. Lutheran Congregation*,⁴ the court said: "In this instance the tunnel passes beneath a corner of the church, and under the whole width of the parsonage. If the parsonage viewed as wholly independent of the church the great

¹ *Damon v. Baltimore & Philadelphia R. R.*, 119 Pa. 287 (1888).

² *Williams v. Philadelphia & Reading Term. Co.*, 29 W. N. C. 254 (1891).

³ *Hagner v. Pennsylvania Schuylkill Valley R. R.*, 154 Pa. 475 (1893).

⁴ 53 Pa. 445 (1866).

portion of the tunnel was unlawfully located beneath it, and the argument which denies the power of the viewers over it forbids the entry of the company. But as we view the case, giving the Acts of 1864 their true interpretation, the entry of the company upon the lot common to both buildings is an undivided act, operating upon one and the same ownership,* and compensated by the same proceeding. The second proviso of the Act of April 1864 requires the viewers, if they find that a place of public worship is so damaged by the tunnel as to render it unsafe to be occupied, to assess the damages at the full value of the building and lot so occupied. The supplement of August, 1864, repeats this language, and adds 'or lots connected therewith.' The appraisement was therefore not to be confined to the church or principal building, or that portion of the ground occupied by it, but embraced the lots and buildings. A congregation often is the owner of a lot embracing not only the church, but other buildings, such as the sexton's house, or a parsonage, or society or school rooms, which are mere appendages, and cannot be separated from the main building without inconvenience and perhaps great loss to the congregation. It would be manifestly unjust to the congregation whose church has to be abandoned, by reason of want of safety, to compel it to divide its lot and retain its mere church appendages. And in a partition, therefore, where division would prejudice or spoil the whole, the law required the viewers to value the lot and the buildings. In this case the report of the viewers finds that the said church and parsonage are so built and connected together upon the said lot of ground as to be in the opinion of the undersigned an entirety, and incapable of being separated without great damage and prejudice to or spoil-

ing both of said buildings. The unity of the building is therefore a fact spread upon the record. . . . The assessment of the whole was therefore proper, and so much of the report as varied the case to suit the view the court might take of the law becomes surplusage merely."

CHAPTER XV.

FARM CROSSINGS.

217. Farm Crossings.

219. Remedies.

218. Agreement with Land-Owner as to Crossing.

220. Duties of Canal Company.

Farm Crossings.

217. The object of the 12th section of the Act of February 19, 1849, relating to farm crossings, was to compel railroad companies to give the owners of farms a convenient access from one part to the other when divided by a railroad. While it may not be impossible for a farmer, in gathering his crops, to make a *détour* of half a mile in getting from one field to an adjoining field, it would, nevertheless, be intolerably inconvenient.

A railroad was located through plaintiff's farm. The railroad company constructed a plank crossing which gave him convenient access from one portion of his farm to the other. The company subsequently removed this crossing, claiming that plaintiff had access by a public road. The public road in question passed along one side of his property until it intersected a turnpike road at nearly right angles. By passing along these two roads, and, in part, by lands of another person, he could reach by *détour* of about half a mile that portion of his farm lying on the south side of the railroad, and on the opposite side from his buildings. The court held that the

plank crossing was necessary to give plaintiff convenient access from one part of his land to the other, and that it ought not to have been removed.¹

But, under the Act of 1849, a company is under no obligation to construct a causeway across the railroad to connect lots of land of a farm where a public road in the immediate vicinity affords easy access to the different lots. In such a case, even where a private way has been destroyed, the railroad company is not obliged to build a causeway.²

Agreement with Land-Owner as to Crossing.

218. If a railroad company has agreed that a trestle-work over a ravine should afford a passage from one part of plaintiff's land to the other, and that this should be in lieu of the causeway which the company were required to make by law, the company cannot afterward prevent the plaintiff from using the passage-way.³

Remedies.

219. If the act provides a remedy, it must be pursued by the parties. The Act of Assembly of February 17, 1831, incorporating the Philadelphia, Germantown & Norristown R. R. Co., made it the duty of the company to construct a sufficient causeway, whenever it should be necessary to enable the owner of the land to cross over or under the road; and it was declared that the company should be liable in an action for damages to any person

¹ Dubbs v. Philadelphia & Reading R. R., 148 Pa. 66 (1892).

In *Holmes v. Philadelphia & Reading R. R.*, 1 Clark, 387 (1843), it was held that where, by the provisions of a charter of a railroad company, the company is required to place a sufficient causeway on each farm, the company may locate the causeway upon any part of the farm which it finds most convenient.

² *Traut v. New York, Chicago & St. Louis R. R.*, 1 Mona. 394 (1888).

³ *Griswold v. Baltimore & Philadelphia R. R.*, 3 Delaware County, 549 (1888).

aggrieved. The company laid out its road through plaintiff's land so as to prevent him from passing from one part of the farm to another, but did not complete the road. Subsequently an act was passed authorizing the company to change its route, and it was provided that any person injured by the change of route might apply to the Common Pleas for the appointment of a jury to assess damages. The court held that the later act repealed the earlier one as to the remedy by action, and that the plaintiff could not maintain an action of trespass, but was confined to the remedy provided by the supplement.¹

In the absence of a statutory remedy, the right may be enforced at common law.

An Act of Assembly incorporating a railroad company made it the duty of the company to provide and keep in repair a suitable passage across the road whenever the railroad should intersect a farm. It was held that under this act that a jury appointed to assess damages had no right to include any claim for bridges. The ground of the decision was, that if such an allowance was allowed it would deprive the parties of the right to have differences arising between them as to bridges "determined by jury under the immediate advice and direction of a court learned in the law." KENNEDY, J., said: "If it be the case, that the complainant below is entitled, under the provisions of the 14th section of the act, to have a bridge erected by the company, he is not without a remedy, though the act be silent in regard to it, because the common law will supply that, as in every other case of an existing legal right on the part of the plaintiff to demand the performance of a duty by the defendant, which the latter is bound in law to discharge."²

¹ *Knorr v. Phila., Germantown & Nor. R. R. Co.*, 5 Wharton, 256 (1839).

² *Philadelphia, Wilmington, etc., Railroad Co. v. Tribble*, 4 Wharton, 47 (1838).

Duty of Canal Company.

220. The construction of a railroad company along the bank of a canal, thereby rendering a farm bridge unsafe and causing it to fall into disrepair, does not relieve the canal company from the duty of repairing the bridge although the railroad company may be responsible for damages to the canal company.¹

¹ *Ammerman v. Wyoming Canal Co.*, 40 Pa. 256 (1861).

CHAPTER XVI.

CONSEQUENTIAL DAMAGES.

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| 221. Where Railroad is Built upon Land Owned by it in Fee. | 228. Owner of Non-abutting Land not Entitled to Damages. |
| 222. Where Railroad is Built Wholly within Limits of Street. | 229. Destruction of Mill-Dam in Navigable Stream. |
| 223. Interference with Access. | 230. Taking of Water from Stream. |
| 224. Excavations or Embankments in Streets. | 231. Taking Stone from Land Condemned. |
| 225. Laying Tracks on Unopened Street. | 232. Right of Mortgagee. |
| 226. Effect of Vacating Street After Tracks are Laid. | 233. What Companies are Liable for Consequential Damages. |
| 227. Overhead Crossings. | 234. When the Right of Action Accrues. |
| | 235. Measure of Damages. |

Where Railroad is Built Upon Land Owned by it in Fee.

221. A railroad company which builds its road through a city entirely upon land which it owns in fee is not liable for consequential damages for indirect injuries to a land-owner, which are merely the result of the subsequent operation of the railroad in a lawful manner, without negligence, unskillfulness, or malice. In a case where the Pennsylvania R. R. Co. extended its line into the centre of the city of Philadelphia, and injured property along Filbert Street, PAXSON, J., said: "If we hold property-owners on Filbert Street are entitled under the Constitution to recover for the injuries complained of in this case; in other words, that it embraces injuries the sole result of the lawful operation of the defendant's road, where are we to stop in its application? Where is the

line to be drawn? If property-owners on Filbert Street may recover, why not those on Arch Street, and Race Street, and so on the north and south, east and west, as far as the whistle of the locomotive can be heard, and its smoke can be carried? The injury is the same; it differs only in degree. And it does not stop here. The Constitution does not apply to railroads merely. It affects all corporations clothed with the power of eminent domain, including cities, boroughs, counties, and townships, it is applicable to canals, turnpikes, and other country roads. If, by judicial construction, we extend the Constitution to all the possibilities resulting from the lawful operation of a public work; to all kinds of speculative and uncertain consequential injuries, we shall find ourselves at sea, without chart or compass to guide us. Were we to adopt such a construction we would be compelled to use the language of Chief Justice SHAW, in *Proprietors of Locks and Canals v. Nashua & Lowell Railroad Company*, 10 Cush. 385, to extend it 'to turnpikes and canals, the value of which is diminished or destroyed by loss of custom; to taverns and public houses deserted or left in obscurity; to stage-coach proprietors and companies, to owners of dwelling-houses, manufactories, wharves, and all other real estate in towns and villages from which the line of travel has been diverted. . If it can extend to the next estate beyond the one crossed or touched by the railroad, why not to the next, which may be affected less in degree, but in the same manner?'

"It is very plain to our view that the constitutional provision was only intended to apply to such injuries as are capable of being ascertained at the time the works are being constructed or enlarged, for the reason, among others, that it requires payment to be made thereof, or security to be given in advance. This is only possible where the

injury is the result of the construction or enlargement. For how can injuries which flow only from the future operation of the road, which may never happen, be ascertained in advance, and compensation made therefor?

"It remains to say that if the construction of the Constitution contended for be correct, then we have a liability imposed upon corporations in the operation of their works which is not now and never has been imposed upon individuals. No principle of law is better settled than that a man has the right to the lawful use and enjoyment of his own property, and that if in the enjoyment of such right, without negligence or malice, an inconvenience or loss occurs to his neighbor, it is *damnum absque injuria*. This must be so, or every man would be at the mercy of his neighbor in the use and enjoyment of his own. In the case of the *Pennsylvania Coal Company v. Sanderson*, 113 Pa. 126, it was said by our brother CLARK: 'Every man has the right and use of his own property, and if, whilst lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is *damnum absque injuria*, for the rightful use of one's land may cause damage to another without any legal wrong.' No man is answerable in damages for the reasonable exercise of a right where it is accompanied by a cautious regard for the right of others, where there is no just ground for the charge of negligence or unskillfulness, and when the act is not done maliciously: *Panton v. Holland*, 17 Johns. 99. We need not consume time by the further citation of authorities for so plain a proposition. It is settled law.

"It was not contended that the injuries of which the plaintiff complains are in any degree the result of the negligence or unskillful operation of defendant's road.

On the contrary, they have expended many millions to enable them to handle their business and convey their passengers and freight into the heart of the city with the least possible annoyance to persons and to injury to property. As was well observed by our brother GORDON, in the *Penna. R. R. Co. v. Lippincott*, the company might have hauled their enormous freight in carts or drays along Filbert Street to its present terminus and no one would have had a legal cause of complaint, though it is easy to see that the condition of property-owners on that street would have been far more intolerable in such case than it is at the present. This brings us to the question whether in case a natural person were the owner of this road and were operating it in the manner that the defendant company are now doing he would be responsible to the plaintiff in damages. We answer this question in the negative. He would not be responsible, for the reason above given, viz.: that he would have a right to the reasonable use and enjoyment of his property, and if, in such use without negligence or malice, a loss unavoidably falls upon his neighbor, he is not liable in damages therefor.

“It is true this principle is qualified to a certain extent. A man may not carry on a business which poisons the air and renders it unhealthy in a thickly populated neighborhood and especially in the centre of a large city. For establishments which involve danger, such as powder-mills, injurious to health, such as lead-works, and manufactories of various kinds which involve noise and disturbance to neighbors, a man must seek a secluded place, where as few persons may be inconvenienced as possible. These exceptions to the general rule are well established, and need not be further dwelt upon. But they have no application to the case in hand. The necessity of a railroad

company and the character of its business compel it to seek the heart of a great city. This is as much for the convenience of the public as for its own. Hence the transportation of passengers and freight as near to the centre of a town as possible is in the direct line of its duty, whether that duty be performed by a corporation or individual. This is a part of the lawful use and enjoyment of property, and where it is done without negligence entails no legal liability therefor.

"The proper use of such a work as this is a matter of great public concern. That it may also put money into the treasury of a corporation is aside from the question. The fact remains that it is a great public benefit, essential not only to the success of the business interests of the city but to other cities and other places as well. It is a metallic nerve which thrills and vibrates from one end of this vast country to the other. There are some inconveniences which, as was decided in *Pennsylvania Coal Company v. Sanderson*, must be endured by individuals for the general good, otherwise we would have a Utopia where the whistle of the locomotive, the hum of the spindle, and the ring of the hammer are never heard. It might be pleasant to dwell where there is nothing to offend the eye, the ear, or any of the senses, but in this age of rapid development in every branch of industry it would be difficult to find such a spot in the vicinity of our large cities.

"We understand the word 'injury' (or injured), as used in the Constitution, to mean such a legal injury as would be the subject of an action for damages at common law. For such injuries both corporations and individuals now stand upon the same plane of responsibility.

"That I am correct in the meaning we attach to the word 'injured' appears abundantly by our own authorities. This was clearly shown by our brother Gordon in

Penna. R. R. Co. *v.* Lippincott. In addition to the authorities there cited by him I will add *Lehigh Bridge Co. v. Lehigh Coal & Nav. Co.*, 4 R. 23; *Pittsburgh & Lake Erie R. R. Co. v. Jones*, 111 Pa. 204.

“It is not necessary for us to look outside of our own State for authorities in construing our own Constitution. It may not be out of place, however, to say that, in England, where they have statutes containing provisions bearing a close analogy to our Constitution, and which gives damages to persons whose property, though not taken, is yet ‘injuriously affected by the construction’ of public works, such damages are not extended to injuries resulting from the operation of the road. It was said by Lord WESTBURY, in *Ricket v. Ry. Co.*, L. R. 2 Eng. and Irish Appeals, 198: ‘I agree with the distinction that has been taken between damages resulting from the railway when complete, or from the act of making it, and damage occasioned by the proper (not negligent) use of the railway when made. No claim can be made for loss resulting from the use of a railway. . . . Compensation is given by the statute only to individuals who, in respect of the ownership or occupancy of lands or tenements, sustain loss in or through the construction of the railway, or the execution of the incidental works.’ To the same point are *Hammersmith and City Ry. Co. v. Brand*, 4 Eng. and Irish Appeals, 171; *Caledonian Railway Company v. Walker*, L. R. 7 Appeal Cases, 259; *Penny v. South-eastern Ry. Co.*, 7 E. & B. 660; *Glasgow Union Ry. Co. v. Hunter*, L. R. 2 Scotch & Div. Appeals, 78.

“The language of the Constitution is not equivocal, and is entirely free from ambiguity. The framers of that instrument understood the meaning of words, and many of them were among the ablest lawyers in the State. Two of them occupy seats upon this bench. Hence, when

they extended the protection of the Constitution to persons whose property should be injured or destroyed by corporations in the construction or enlargement of their works, we must presume they meant just what they said; that they intended to give a remedy merely for legal wrongs, and not for such injuries as were *damnum absque injuria*. Among the latter class of injuries are those which result from the use and enjoyment of a man's own property in a lawful manner, without malice. Such injuries have never been actionable since the foundation of the world."¹

Where Railroad is Built Wholly within Limits of Street.

222. When a railroad company lays its tracks upon a public highway, it does so upon the conditions that the way shall not be lost to the public, and that, if the abutting owner is subjected to new and additional burden, compensation must be made to him for the injuries sustained. "The title to the highway is in the commonwealth as the representative of that portion of her citizens interested in its use. The duty to maintain it and to protect the public in its use rests on the municipality. The public easement is broad enough to include the various modes of travel in common use, and to admit such new and improved modes as the public may adopt, subject only to this necessary limitation that the new modes adopted must not be destructive of or inconsistent with the use of the highway for the purposes and in the manner for which it was intended, nor with the municipal control over it. Now, when the commonwealth authorizes

¹ Pennsylvania R. R. v. Marchant, 119 Pa. 541 (1888); Pennsylvania R. R. v. Lippincott, 116 Pa. 472 (1887); Dooner v. Pennsylvania R. R., 142 Pa. 36 (1891); Jones v. Erie & Wyoming R. R., 151 Pa. 30 (1892); Pittsburgh Junction R. R. v. McCutcheon, 18 W. N. C. 527 (1886); Pennsylvania R. R. v. Duncan, 129 Pa. 181 (1889).

the construction of a railroad upon a line which makes it necessary to cross one or more public highways, it authorizes its grantee by a necessary implication to enter and use such highways for such purpose. This grant is, however, subject to two limitations; one in favor of the public, as already stated, for the preservation of the way; the other in favor of the owner, which requires that no additional servitude shall be imposed upon the land covered by the public easement. If the first limitation be violated so that the way is lost to the public, another must be provided to take its place. If the second be violated so that the owner is subjected to new and additional burdens, he is entitled to compensation for the injury actually sustained. It follows that the railroad company desiring to cross the streets of a city must apply to the city for leave, and for the conditions deemed necessary to secure the public convenience and safety. This being done, the railroad company may lawfully enter upon and cross a public highway without liability, so long as it complies with the terms imposed by the municipality and keeps within the limits already stated."¹

Where a railroad track is on a public street, owners of property in the vicinity, to sustain a complaint for constructing and maintaining it, must establish that it is a public nuisance, and that they have sustained a special damage.²

A land-owner is not entitled to damages for injuries caused by smoke, dust, and noise from a railroad built and operated wholly within the limits of a public street.³

¹ *Jones v. Erie & Wyoming Valley R. R.*, 151 Pa. 30 (1892); *Pittsburgh Junction R. R. v. McCutcheon*, 18 W. N. C. 527 (1886); *Pennsylvania R. R. v. Duncan*, 129 Pa. 181 (1889).

² *Black v. Philadelphia & Reading R. R.*, 58 Pa. 249 (1868).

³ *Jones v. Erie & Wyoming Valley R. R.*, 151 Pa. 30 (1892); *Struthers v. Dunkirk, Warren & Pittsburgh Ry.*, 87 Pa. 282 (1878).

Prior to the Constitution of 1874 it was not a taking of land within the meaning of the Constitution for a railroad company to move its track in a public street nearer to a land-holder's lot, but within the limits of the street, although the land-owner owned the fee to the middle of the street.¹

Interference with Access.

223. A railroad company which interferes with access to abutting property in laying its tracks on a street is liable in damages.

Plaintiffs owned a property in Norristown on Lafayette Street consisting of a church, parsonage, and tenement-houses. The defendant, a railroad company, constructed its railroad and laid its tracks close to the curbstone in front of the properties. It was held that plaintiff was entitled to recover damages for interference with access to the properties. The court said: "It was urged that the mere laying down of the tracks in front of the plaintiffs' property was not of itself any injury; that it was a benefit in view of the fact that the street had been greatly improved by having been repaved with Belgian blocks in a superior manner, and that the injury was solely the result of the use and operation of the road. This is plausible but unsound. Where the question is the obstruction of access to a property by the building of a railroad, it is impossible to separate the construction from the operation of the road. Such a doctrine would be a misapplication of the rule laid down in *Railroad Company v. Marchant*. It would be an unsavory technicality to hold that a railroad laid down by the curb in front of a man's door, with trains constantly passing and repassing, did not interfere with his access to his house, and was not an

¹*Snyder v. Pennsylvania R. R.*, 55 Pa. 340 (1867).

injury caused by the construction of the road. No authority for such a proposition can be found in anything this court has ever said. We are of opinion that in the case in hand there was an injury arising from the erection and construction. This being so, it stands upon the same footing as to consequential injuries as if it had been an actual taking of a portion of the plaintiffs' property."¹

A railroad company is liable for consequential damages, if it shifts its tracks in a street so as to bring them nearer to a house and depreciates its value.²

Where a railroad company by city ordinance is granted a right of way south of the centre line of a street at grade, and the remaining part of the street is wide enough for free and convenient access to the property on the south side of the street, the owner of the property on the north side of the street can neither enjoin the railroad company from proceeding under the ordinance nor recover damages for the proper use of their privilege under the ordinance.³

A railroad company without the consent of a borough or any authority whatever, laid a track in front of plaintiff's dwelling on property within plaintiff's line, and cut away and removed a small part of his porch. The approach to the house was thereby rendered difficult and dangerous. In consequence of the close proximity of passing trains to the house, the walls thereof were shaken, and the house itself filled with smoke, cinders, and offensive smells, necessitating the closing of the front window

¹ *Pennsylvania Schuylkill Valley R. R. v. Walsh*, 124 Pa. 544 (1889); *Pennsylvania Schuylkill Val. R. R. v. Ziemer*, 124 Pa. 560 (1889); *Pittsburgh Junction R. R. v. McCutcheon*, 18 W. N. C. 527 (1886); *Pennsylvania R. R. v. Duncan*, 129 Pa. 181 (1889).

² *Patent v. Philadelphia & Reading R. R.*, 14 W. N. C. 545 (1884); *a. c.* affirmed, 17 W. N. C. 198 (1886).

³ *Beck v. Erie Terminal R. R.*, 11 Pa. C. C. B. 363 (1892).

and door. It was held that plaintiff could maintain a common-law action for consequential damages.¹

Excavations or Embankments in Streets.

224. Under the General Railroad Act of 1849, the mere laying of additional tracks in a street where no excavation or embankment has been made, will not entitle the owners of property along the street to recover damages from the railroad company, although viewers find that the approach to their lands has been obstructed. The court said: "Very many persons regard any railroad track, especially a steam railroad, upon the street in front of their property as an obstruction to the approach, whether the track be laid on the grade, or above it, or below it. We have no means of knowing whether the viewers in this case so regarded it or not, nor is it necessary we should. If there was an embankment or excavation in the street, in front of the land of these petitioners, it was very easy to say so. The court cannot infer it, and it is altogether unfair to a judicial tribunal to compel it to infer a cause of action where it is so very simple and easy a matter to allege and prove it, if it really exists. We are at a loss to understand why these proceedings are deficient in this respect. The papers appear to be carefully drawn, the act is specific in designating the very thing for which damages may be given and yet nowhere in this record is there an averment which brings the case within the terms of the act. An obstruction by a track laid on the grade is not a cause for which damages may be awarded under the Act of 1849, and no decision to that effect has ever been rendered by this court. On the contrary, so far as our utterances have gone on that subject, they are directly against such a right."²

¹ Northern Central Ry. v. Holland, 117 Pa. 613 (1887).

² Cumberland Valley R. R. v. Rhoadarmer, 107 Pa. 214 (1884).

The Common Pleas has no jurisdiction to appoint viewers, under the Act of July 19, 1849, to assess consequential damages arising from constructing a railroad upon a public street at grade in front of and to the damage of abutting property if there has been no excavation or embankment made.

In *Ryan v. Penna. Schuylkill Val. R. R.*,¹ BOYER, P. J., said: "The petition set forth facts sufficient to show damages sustained by the property described and its depreciation in value for the purposes to which it is adapted; but to give the court jurisdiction in the form of remedy which the petition invokes the injury complained of must be of the character described in the Act of Assembly which provides for this mode of assessing damages. Either land must have been actually taken for the uses of the railroad; or if, as in this case, the railroad complained of is constructed upon a public street in a borough, the court has only jurisdiction to appoint viewers to assess the damages occasioned 'by reason of any excavation or embankment made in the construction of such road.'

"Neither of these grounds for the exercise of jurisdiction is laid in this application, and however great may be the damages to the property described consequential to the construction of the railroad in close proximity to it their recovery must be sought for in another form of action."

If an ordinance granting to a railroad company the right to lay its tracks upon a street provides that the company shall conform to a certain grade, and the company does not conform to the actual grade of the street, the company is liable for damages caused by its embankment.²

The ties and filling of a railroad are a part of an em-

¹ 1 Pa. C. C. R. 650 (1886).

² *Duke v. Baltimore & Cumberland Valley R. R.*, 129 Pa. 422 (1889); *Seipel v. Baltimore & Cumberland Valley R. R.*, 129 Pa. 425 (1889).

bankment within the meaning of the General Railroad Act of 1849, which gives damages to an abutting owner for any excavation or embankment made in the construction of a railroad upon a public street.¹

Where a railroad was constructed on a public street, and a property-owner claimed that there was an "embankment" or "excavation" in front of his property, the burden was on the company to show that there was an established grade of the street to which they conformed.²

An owner of a lot abutting on a public street can only recover in the statutory proceedings under the Act of February 14, 1849, damages which result from the construction of the railroad in the street; he is not entitled in such proceedings to recover damages resulting from the construction of a railroad outside of the lines of the street. Damages for the latter injury may be recovered at common law, but not in the statutory proceedings. Thus a railroad was constructed on an embankment across some marshy ground, and then continued on an embankment within the lines of a street. It appeared that both the embankment in the swamp and its extension in the street combined to obstruct the flow of the water in the street, and flooded it back into the cellar of a house. It was held that the owner of the house could only recover in the statutory proceedings, damages resulting from the embankment in the street.³

The Act of February 19, 1849, makes no provision for the assessment of damages where the grade of a highway is changed, unless such highway constitutes a street or alley in a city or borough.⁴

¹ *Pittsburgh, Virginia & Charleston R. R. v. Rose*, 74 Pa. 362 (1873).

² *Pittsburgh, Virginia & Charleston R. R. v. Rose*, 74 Pa. 362 (1873).

³ *New Castle & Franklin R. R. v. McChesney*, 85 Pa. 522 (1877).

⁴ *Scharff v. Pennsylvania Schuylkill Valley R. R.*, 7 Montgomery County Law Rep. 54 (1891).

Laying Tracks on Unopened Street.

225. A railroad company must make compensation to the owner if it lays its tracks upon the unopened portion of the street; the fact that the street has been located on the city plan, and that the railroad company has been given permission by councils to use the street, and has given bond to the city to indemnify it against all damages to property-holders, will not relieve the railroad company from the duty of making compensation to the owners.¹

The mere fact that a street is placed upon a borough plan with a view of subsequently being opened, does not give to a railroad company the power to take and occupy the same in the construction of its roadway, without compensation to the owner of the land. Even if no excavation or embankment is made by the railroad company, the court has jurisdiction to appoint viewers to assess damages.²

Effect of Vacating Street After Tracks are Laid.

226. A railroad was located within the lines of a highway, and the location adopted by the board of directors. Before the road was actually built, however, an act was passed vacating the highway. It was held that an abutting owner had no title after such vacation as would justify an award of damages.³

Overhead Crossings.

227. The fact that an overhead crossing in a city may frighten horses, is not an element of damages in a suit for consequential injuries.⁴

Where a railroad is carried diagonally across the inter-

¹ Beidler's Ap., 1 Mona. 336 (1889).

² Quigley v. Pennsylvania Schuylkill Valley R. R., 121 Pa. 35 (1888).

³ *In re Connecting R. R.*, 1 Leg. Gaz. Rep. 22 (1870).

⁴ Jones v. Erie & Wyoming Valley R. R., 151 Pa. 30 (1892).

section of two public streets and supported upon abutments built entirely upon a railroad company's land, the abutting land-owner is entitled to damages for the exclusion of light and air from his dwelling. In such a case WILLIAMS, J., said: "The company had the right under its charter, and the municipal consent to enter and cross the highway without liability to the plaintiff, provided it could do so without subjecting his property to any servitude which the public easement then existing did not impose. But the elevated crossing overhanging so much of his land as is covered by the highway does, to some extent, impose an additional servitude upon his property. While the streets remain on the surface, the use of the space above them by the defendant does not interfere with the plaintiff's use of his property that is subject to the public easement; and the probability of the vacation of the streets in the built-up part of the city is so slight as scarcely to deserve consideration. But if this elevated crossing does to any appreciable extent exclude light and air from the double dwelling, or affect the value of his property by reason of any additional servitude imposed upon it, for the injury so sustained the plaintiff may recover, because such injury is the result of the construction of the defendant's railroad."¹

Where a railroad is carried diagonally by an overhead bridge across the intersection of two streets, the abutting land-owner is not entitled to the damages for interference of access to his building.²

Owner of Non-abutting Land not Entitled to Damages.

228. A person who is not the owner of land abutting upon a street has no right to recover damages upon the

¹ *Jones v. Erie & Wyoming Valley R. R.*, 151 Pa. 30 (1892).

² *Jones v. Erie & Wyoming Valley R. R.*, 151 Pa. 30 (1892).

ground that the street has been made inconvenient and dangerous to travelers over it. Thus a lot-owner whose lot does not approach nearer to the line of a railroad upon a street than from one to two hundred feet, but who is within reach of the noise and dust produced by the ordinary operations of the road, cannot recover damages for the consequential injury sustained by reason of such noise and dust.¹

Destruction of Mill-Dam in Navigable Stream.

229. The right to erect a mill-dam in a navigable stream, granted by an Act of Assembly, is a mere license, and damages for the destruction of the dam by the construction of a railroad cannot be allowed.²

Taking of Water from Stream.

230. A railroad company has a right to take water from a stream at a point entirely upon its own land for the purpose of supplying locomotives, if the quantity taken makes no essential diminution in the stream. Such taking is not under the right of eminent domain, but by virtue of the company's right, as a riparian owner on the stream. If, however, the railroad company take more than it is entitled to, the lower riparian owner may recover damages from the railroad company in a common-law action.³

Taking Stone from Land Condemned.

231. A railroad company has no right to take stone or other material upon the lines of its track to aid in the

¹ *Pennsylvania Co., etc., v. Pennsylvania Schuylkill Valley R. R.*, 151 Pa. 334 (1892). See *Ritchie v. Pittsburgh & Lake Erie R. R.*, 1 Lancaster L. Rev. 213 (1884).

² *New York & Erie R. R. Co. v. Young*, 33 Pa. 175 (1859).

³ *Pennsylvania R. R. v. Miller*, 112 Pa. 34 (1886).

construction of a road. Unless the company purchases and owns the land over which the road is laid, it does not own the materials excavated from its bed. It has the right to level and fill up the track of the road, so as to give it the proper grade; but when materials are excavated, they belong to the owner of the land. The company can only take the necessary timber, stones, gravel, etc., either on or off the track of the road, by paying for it.¹

Right of Mortgagee.

232. The holder of a mortgage upon a house and lot abutting upon a street, has no right to bring an action against a railroad company which has occupied the streets with its tracks to recover damages for an alleged depreciation of the value of the property by the building of the railroad upon the street. "The right of action for such consequential injuries is in the owner, and if the party exercising the right of eminent domain desires to make an amicable settlement for any damages done thereby, the owner residing on the land is the proper person to whom to apply. The injury is one done to the freehold, as the result of the lawful act of another done beyond the lines of the injured property, and the owner of the freehold is the only person in whom a right of action for such an injury can reside. If the owner should refuse to move, or should act fraudulently, the courts upon a proper application by lien creditors would no doubt treat him as a trustee and require him to do, or permit his creditors to do in his name, what might be necessary to an adjustment of the damages, and impound the money for those equitably entitled to receive it. In this case the owner has settled with the defendant and

¹ *Nisley v. Harrisburg, Portsmouth, Mount Joy & Lancaster R. R.*, 1 Pearson, 23 (1851).

given a release of damages. There is no allegation that the settlement was secured by fraud on the part of defendant, or made by the owner with a purpose to defraud the plaintiff. The plaintiff brings his suit upon a right of action which he alleges rests in him as a lien creditor. Notwithstanding the settlement and release by the owner, he claims to be entitled to recover his damages, as distinguished from the damages of the owner. The right of action asserted is not that of the owner of the property, but one independent of, and additional to, that which resides in the owner. If this position is tenable for the plaintiff it would be equally so for any number of lien creditors of Mrs. Hermle. A settlement with or a recovery by one, would not estop another from taking the chances of a more favorable verdict. To state the position is a sufficient argument against its soundness."¹

What Companies are Liable for Consequential Damages.

233. Exemption of railroad corporations from the operation of future general enactments, either constitutional or legislative, cannot exist unless given expressly, or by an implication, equally clear with express language; wherefore the mere fact that the charter of the company imposes upon it no liability for consequential injuries, arising from the construction or enlargement of its works, does not give rise to a contract that it shall always be exempt from such liability.²

¹ *Knoll v. New York, Chicago & St. Louis Ry.*, 121 Pa. 467 (1888).

² *Pennsylvania R. R. v. Duncan's Admr.*, 129 Pa. 181 (1889) (Sup. Ct. U. S.); s. c. 25 W. N. C. 1; *Levering v. Philadelphia, Germantown & Chestnut Hill R. R.*, 18 W. N. C. 50 (1885); *Pittsburgh Junction R. R. Co. v. McCutcheon*, 18 W. N. C. 527 (1886). Prior to the Constitution of 1874 consequential damages were not allowed unless provided for in the act of incorporation. An act of incorporation is constitutional, although no provision has been made for consequential damages: *Reitenbaugh v. Chester Val. R. R. Co.*, 21 Pa. 100 (1853); *New York & Erie R. R. v. Young*, 33 Pa. 175 (1859).

A company formed by the consolidation of three other companies under the Act of May 3, 1854, which provides that the consolidation company should be subject to the General Railroad Act of February 14, 1849, subjects the company to § 8, art. xvi, of the Constitution of 1874, requiring the payment of compensation in the nature of consequential damages for property injured.¹

When the Right of Action Accrues.

234. The right to consequential damages conferred by the Constitution of 1874 accrues when the particular part of the work causing the injury is actually undertaken, and not when the railroad is first located and the appropriation made. "It has been repeatedly held, construing the Act of 1849, that when the railroad has been located the land has been taken and appropriated for public use; that the right of the land-owner to sue for his damages is complete, and he may recover all which may be caused by the location and by the subsequent construction; that he can have but one action, and that the damages cannot be severed: *Wadhams v. R. R. Co.*, 42 Pa. 310; *Beale v. Penna. R. R. Co.*, 86 Pa. 509. The constitutional provision must, we think, receive a similar construction. If the damages must be paid or secured before the injury, it follows that as soon as the work is actually undertaken at the point where the injury is done, according to the plans and purposes of the company, as defined by their location, grade, and general scheme of construction, the injury is complete, and, if the damages are neither paid nor secured, an action may be maintained for the damages consequent upon the completion of the road in accordance therewith. The action is not for an ordinary trespass; no actual trespass was committed; the in-

¹*Northern Central Ry. v. Holland*, 117 Pa. 613 (1887).

jury, if any, is purely consequential. It is an injury arising from the proposed construction and completion of the road, which has been already undertaken; it is a single injury, entire and indivisible, and the damages cannot be severed. There can, therefore, be but one action, and that action, as we have said, may be brought as soon as the work which results in the injury complained of is undertaken. It is not in conformity with either the letter or the spirit of the Constitution to hold that the right of action shall be postponed until the injury is complete, for the provision is plain that 'the compensation shall be paid or secured before the taking, injury, or destruction.' Moreover, if the right of action be thus postponed, it would be in the power of the company, by a tardy performance, to delay the action indefinitely. The action is for consequential damages on the principles of the common law, but the right of action, in advance of the injury, is conferred by the provisions of the Constitution, and, in this respect, the present case differs from the *Schuylkill Nav. Co. v. Thoburn*, 7 S. & R. 410."¹

In an action to recover damages for interference with access to plaintiff's property, caused by the construction of a railroad in a street, it appeared that the railroad had been located in the lifetime of plaintiff's ancestor, but not constructed until after his death. It was claimed that the action should have been brought by the ancestor's personal representatives, and not by his heirs. The court sustained the action by the heirs, saying: "The action was for consequential injuries. There was no taking of any portion of the plaintiff's property. The plaintiff's ancestor was not injured by the setting of construction stakes in a public highway. They were not

¹ *O'Brien v. R. R.*, 119 Pa. 184 (1888).

seen on his property, nor was anything belonging to him taken or injured thereby. In such cases there can be no legal injury for the erection or construction until such erection or construction has commenced. The work might have been abandoned before a beginning had been made. In such case the property-owner would have no cause of action. There is no analogy between this case and the location of a railroad over a man's land. In the latter instance the land has been taken and appropriated to public use; the right of the land-owner to sue for damages is complete, and he may recover for the location and for the subsequent construction: *Wadhams v. Railroad Co.*, 42 Pa. 303; *Beale v. Railroad Co.*, 86 Pa. 509."¹

Measure of Damages.

235. Plaintiff brought an action of case to recover damages for injury to three houses erected by plaintiff on ground leased by him, and which, under the terms of the lease were his property. Plaintiff had erected the houses for the purpose of renting them. It was held that the measure of damages was an amount sufficient to make up for the loss of rent, as far as the jury could foresee it, during the terms of the lease of the land on which the houses stood.²

In a suit for consequential damages against a railroad company for laying a siding upon a public street it is proper to permit the defendant to inquire of plaintiff whether he would take a sum certain for the property as affected by the siding and also of his own witness whether the witness would give a sum certain for the property thus affected.³

¹ *Pennsylvania Schuylkill Valley R. R. v. Ziemer*, 124 Pa. 560 (1889).

² *Pittsburgh Junction R. R. v. McCutcheon*, 18 W. N. C. 527 (1886).

³ *Auman v. Philadelphia & Reading R. R.*, 133 Pa. 93 (1890).

Where a siding is built upon a public street an abutting owner in a suit for consequential damages may show for what purpose the siding was and had been used, the amount of freight transported and the number of trains run as evidence of the ordinary and probable uses to which the railroad might be put.¹

¹ *Auman v. Philadelphia & Reading R. R.*, 133 Pa. 92 (1890).

CHAPTER XVII.

REMEDIES FOR UNLAWFUL ENTRY ON LAND.

236. Injunction.
237. Ejectment.
238. Trespass.

239. Land-Owner's Rights after Location, but before Security Entered.

Injunction.

236. An owner of land abutting on a street is entitled to an injunction to restrain a railroad company from laying its tracks upon the street where the company has no authority so to do. "All persons who merely travel on the street suffer the same kind of inconvenience or injury, though the suffering may differ in degree. But he who has his dwelling fronting on the street who cannot turn his carriage between the front of his lot and the rails, who must drive around a block because he cannot turn in the street, whose business as a physician is interfered with, or who is subject to the smoke, noise, and other incidents of railway trains passing near his door, suffers a special injury which differs in kind as well as degree from the mere traveler. Were the road lawfully constructed, the only question would be whether the plaintiff's lots were worth less by reason of the construction, and if so, how much."¹

An injunction will be granted to restrain a railroad company from the use of land taken by it some fifteen

¹ Per TRUNKY, J., in *Pennsylvania R. R. Co.'s Ap.*, 115 Pa. 514 (1886).

years before the filing of the bill, and used continuously afterward, even though the land belonged to a *feme covert*, if the company had neither paid for it nor tendered a bond to secure the payment of the damages.¹

Under the Constitution a corporation must either pay or secure payment before it can enter upon the possession of the property of any one, and until this is done, it will be enjoined from proceeding, and this notwithstanding the fact that the charter of incorporation plainly implies the power of entry without first having made or secured compensation.²

An injunction may issue at the suit of a property-owner to restrain a railroad company from constructing its railroad in a street until security is entered for consequential damages.³

An injunction was issued to restrain a railroad from entering upon land where the purpose of the company was to obtain stone which it had failed to obtain from the owner of the land at the price offered to him by the company.⁴

Ejectment.

237. Ejectment is the appropriate remedy against a railroad company which enters upon land without paying or securing damages to the land-owner.⁵ The owner's right to an ejectment will not be barred by an agreement on the part of the railroad company to purchase its right of way within a certain time, which agreement was never carried out.⁶

¹ Seal v. Northern Central Ry., 1 Pearson, 547 (1868).

² Colgan v. Allegheny Valley R. R., 3 Pittsburgh Rep. 394 (1872).

³ Minnig v. New York, Chicago & St. Louis R. R., 11 W. N. C. 297 (1882). See Dutton v. Norristown Pass. Ry., 1 Montgomery Co. Rep. 4 (1885).

⁴ Pittsburgh, Chartiers & Youghiogheny Ry. v. Scully, 16 W. N. C. 213 (1884).

⁵ McClinton v. Pittsb., Ft. Wayne & Chicago R. R., 66 Pa. 404 (1870).

⁶ Philadelphia, Newtown & New York R. R. v. Cooper, 105 Pa. 239 (1884).

The interest of an owner of land taken by a railroad company without compensation is not divested by the sale of the property of the railroad company under a mortgage executed by the company prior to the taking of the owner's land. In such a case the owner has an estate which is not affected by the judicial sale, and he may maintain ejectment for it.¹

An action of ejectment may be maintained by a tenant in common against a railroad company for land occupied by the company for a purpose not authorized by its charter, although the company had a license to use the land, from the other tenant.²

A railroad was located and constructed on a farm owned by several tenants in common. Under an amicable submission an award was made in favor of the tenants in common, and against the railroad company, but the compensation was neither paid nor secured. One of the land-owners subsequently acquired the title to the whole tract of land by purchase from his co-tenants. He then brought an action of ejectment against the railroad company, which resulted in a judgment in his favor. It was held that the plaintiff in the ejectment was not entitled to the whole of the fund for distribution, as a sole owner of the land at the time of recovery, but the fund was distributable to the tenants in common at the time the award was made, according to their several interests. It was also held that the co-tenants were bound to contribute their proportionate share of the expenses of the ejectment including counsel fees.³

An award of arbitrators fixing the amount of compensation to land-owners for land taken by a railroad

¹ Buffalo, New York & Philadelphia R. R. v. Harvey, 107 Pa. 319 (1884).

² Cumberland Valley R. R. v. McLanahan, 59 Pa. 23 (1868).

³ Warrell v. Wheeling, Pittsburgh & Baltimore R. R., 130 Pa. 600 (1890).

company will not prevent one of the owners who has subsequently acquired all the other interests, from instituting an action of ejectment against the railroad company, where the company has failed to pay the amount of the award. In such a case after twenty-eight years, no presumption of payment, or of a tender of security, arises in favor of the railroad company from either the lapse of time, or from the award. The award and agreement on which it was founded, however, exhibits an equity which properly reduces the judgment to a conditional one, and thus relieves the company from a total loss of its improvements.¹

In an action of ejectment for land which a railroad company has taken and occupied by its improvements, under a mistake as to its rights, the court will stay the execution until the railroad company has had an opportunity to institute proceedings to condemn the land.²

Where land has been appropriated by a railroad company, and the owner dies before having received payment of compensation or security therefor, his heirs, to whom his title descends upon his death, are clothed with all his rights and may maintain ejectment against the railroad company for the land occupied by it.³

Trespass.

238. If a railroad company enters upon land before a bond, which has been refused by the owner of the land, is

¹ *Wheeling, Pittsburgh & Baltimore R. R. v. Warrell*, 122 Pa. 613 (1888).

² *Pittsburgh & Lake Erie R. R. v. Bruce*, 102 Pa. 23 (1882); *Justice v. Nesquehoning Valley R. R.*, 87 Pa. 28 (1878); *O'Hara v. Pennsylvania R. R.*, 2 Grant, 241 (1858); *McClinton v. Pittsburgh, Fort Wayne & Chicago R. R.*, 66 Pa. 404 (1870).

³ *Oliver v. Pittsburgh, Virginia & Charleston Ry.*, 131 Pa. 408 (1890); *Mumma v. Harrisburg, Portsmouth, Mount Joy & Lancaster R. R.*, 1 Pearson, 65 (1854).

approved by the court, the company is guilty of a trespass, for which the owner is entitled to damages.¹

If, after the location of the railroad, a part of the land only is retained and the other part relinquished before condemnation proceedings are begun, the owner is entitled to damages not only for the portion of his land formerly taken by the railroad company but also for the temporary use of the part relinquished.²

If a railroad company makes an entry on land without payment of compensation to the owner, the owner may institute proceedings for damages, and after these have been allowed damages for the past unlawful possession may be recovered by the owner from the company by an action of trespass.³

The entry of a railroad company after damages have been secured to the owner is not a trespass, although the court may direct an issue in the Common Pleas in the form of an action of trespass *quare clausum fregit*. But in the trial of such an action the court should not charge the jury that the defendants had committed a trespass upon the property of the plaintiff.⁴

In *Schuler v. Northern Liberties & Penn Township Railroad*⁵ it appeared that the Act of April 23, 1829, incorporating the defendant company provided that if the parties could not agree upon the amount of damages it should be lawful for the Court of Common Pleas to award a *venire*, etc., and on report of the jury and final judgment thereon, and on the payment of the amount of

¹ *Dimmick v. Brodhead*, 75 Pa. 464 (1874); *McClinton v. Pittsburgh, Fort Wayne & Chicago R. R.*, 66 Pa. 404 (1870); *Penna. R. R. v. Eby*, 107 Pa. 166 (1884).

² *Bate v. Philadelphia, Norristown & Phoenixville R. R.*, 1 Montgomery County L. Rep. 47 (1883).

³ *McClinton v. Pittsburgh, Fort Wayne & Chicago Ry.*, 66 Pa. 404 (1870).

⁴ *Shenango & Allegheny R. R. v. Braham*, 79 Pa. 447 (1875).

⁵ 3 Wharton, 554 (1838).

damages to the owner of the land, or, if he should refuse to receive it or be incapable, etc., then, on payment of the money into court, the company should become seized of the same estate, etc., as the owner had. A judgment was entered and the money paid into court, after which the company entered upon the land. Before the entry, however, the plaintiff had removed the case into the Supreme Court by *certiorari*. The plaintiff brought an action of trespass *q. c. f.* The court held that the plaintiff was not entitled to maintain the action, as under the terms of the act the company was seized with the land and had a right of entry as soon as they paid the money into court.

Land-Owner's Rights after Location, but before Security Entered.

239. After the location but before the entry of bond or payment of compensation, the land-owner has the right to occupy and cultivate the land. If therefore he plants crops after the location of the road, he is entitled to recover damages for their destruction in the building of the road.¹

While a land-owner has notice, by the location of the railroad over his lands of the purpose of the company to appropriate so much as the line of the road covers, he has no notice of the time when actual possession will be required. He may abandon the land covered by the line as located to the company, and proceed to have his damages assessed; or, he may wait for the company to take the initiative and continue meantime to occupy and cultivate it. If he takes the latter branch of the alternative, the crops planted after the location and before notice or

¹ *Gilmore v. Pittsburgh, Virginia & Charleston R. R.*, 104 Pa. 275 (1883); *Scranton & Forest City R. R. v. Delaware & Hudson Canal Co.*, 1 Lack. Jurist, 93 (1889). See *Shick v. Pennsylvania R. R.*, 1 Pearson, 262 (1867).

bond given by the railroad company, are proper subjects for compensation. The reason for this is that it may be months or even years after the location of the line before the company will be ready to enter upon the land for the purposes of construction or to take the steps necessary for the assessment of damages, and the owner has a right to remain in possession until actual appropriation of his land by the company. A tenant of the owner to whom the land was leased after the location of a railroad, and with notice thereof, may also recover for growing crops which were planted before he had notice of the intention of the railroad company to enter for construction.¹

¹ *Lafferty v. Schuylkill River East Side R. R.*, 124 Pa. 297 (1889).

CHAPTER XVIII.

AGREEMENTS WITH LAND-OWNER.

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| 240. What Constitutes a Release of Damages. | 247. Agreements as to Stations. |
| 241. What Damages are Included in the Release. | 248. Agreements as to Sidings. |
| 242. What Damages are not Included in the Release. | 249. Agreements as to Fences. |
| 243. Release of Damages does not Convey Title. | 250. Agreement to Pay Money to Secure Particular Location of Road. |
| 244. Deeds. | 251. Acquiescence of Land-Owner. |
| 245. Nature of the Estate Acquired. | 252. Duty of Viewers to Pass Upon Agreement to Release Damages. |
| 246. Boundaries. | 253. Breach of the Agreement. |
| | 254. Injunction to Enforce Agreement. |

What Constitutes a Release of Damages.

240. A mere offer on the part of the land-owner that he will not claim damages if the road is located where he wishes it, not accepted at the time by the railroad company, will not subsequently prevent the owner from recovering damages, although the company has in the meantime offered to locate the road where he wishes it, and he has refused to designate the location which he desires.¹

When a release of damages was presented to a land-owner by the president of a railroad company, the land-

¹ East Penna. R. R. Co. v. Hiester, 40 Pa. 53 (1861). See, also, Sec. 266 as to agreements for free passes.

owner said to the president that if he would locate the road further over from his house and spring he would give the land for nothing, and the president said he would "try to accommodate." The court held that this conversation was too slight to prove the grant of a right of way or release of damages, because there was no sufficient designation of the land released.¹

Where a railroad company agreed with the land-owners, over whose land the road crossed, that in consideration of paying no damage for the right of way, the landholders might remove all coal beneath the road-bed, the landlords to first give written notice to the company when they were ready to move the coal, at which time the company were to either change the route, or secure the road from damage—such an agreement is not illegal or against public policy so as to relieve the company from the obligation of performing their contract.²

After an action for consequential injuries had been begun against a railroad company, the land-owner and the company entered into an agreement under seal by which the valuation of the land at the time of the injury was referred to arbitrators. Under the agreement the defendant was to pay the price awarded, and the plaintiff was to convey the land to the company in fee-simple. The price when paid was to extinguish the plaintiff's claim for damage. The railroad subsequently tendered an amount of the award to the plaintiff, who refused to accept it. It was held that the agreement was available as a defense to the action for the consequential injuries, although it was not pleaded until three years after the date of the award, and although, at the time

¹ East Pennsylvania R. R. Co. v. Schollenberger, 54 Pa. 144 (1867).

² Verner v. Mine Hill & Schuylkill Haven R. R., 2 Leg. Chron. Rep. 310 (1875).

of the trial, more than six years from said date had elapsed.¹

If a railroad company alleges that a land-owner agreed to release his damages, the court should not charge that such agreement "must be established by clear, precise, and satisfactory proofs."²

What Damages are Included in the Release.

241. An agreement between a land-owner and a railroad company to sell the latter a right of way across the premises of the former, covers all damages, of whatsoever sort, suffered by the land-owner, for which he is legally entitled to compensation.

Defendant company obtained from the plaintiff a release for the right of way of eighty feet in width across his farm. The agreement further released the said company from all claims for damages by reason of the taking and using of the land for said railroad, or by reason of the construction and maintenance of the said railroad, on and over said tract of land. The plaintiff contended that about six acres of his land was repeatedly overflowed and rendered unfit for cultivation, by reason of the construction of a ditch culvert by the railroad company, which he alleged threw water upon his land, which would not have otherwise flowed there. The court held that the plaintiff was not entitled to recover, saying: "A release of the right of way to a railroad company would be a vain thing if the company is to be subsequently subjected to litigation for every injury or damage resulting to the property by reason of the construction of the road. All these matters are supposed to be in the contemplation of the parties when the company pays its

¹ Jones v. Pennsylvania R. R., 143 Pa. 374 (1891).

² East Pennsylvania R. R. v. Schoellenberger, 1 Walker, 401 (1864).

money for the right of way, and obtains a release therefor."¹

A lessee of land cannot recover damages for injuries caused by an insufficient culvert on the line of a railroad, where the owner of the land executed, after the culvert was constructed, a release to the company "of, and from all suits, claims, demands, and damages whatever, for, upon, or by reason of their entry upon and taking and occupying the land, and the location and construction thereon of said railroad and works connected therewith."²

A land-owner released a railroad company from all damages "by reason of the overflow of my said lands caused by a culvert." The release concluded that it was to operate as a full discharge for all past and future damages "sustained under any circumstances for the cause afore mentioned, or for or by reason of any other matter, cause, or thing touching or concerning the same." The railroad company subsequently constructed other drains, causing an additional overflow of plaintiff's lands. It was held that plaintiff could not recover for the additional overflow or flooding.³

What Damages are not Included in the Release.

242. An ordinary release of right of way does not cover injuries resulting from the subsequent negligence of the railroad company in failing to maintain proper culverts.

A land-owner released a right of way to a railroad company by a deed which contained the following clause:

¹ Updegrave v. Pennsylvania Schuylkill Valley R. R., 132 Pa. 540 (1890); North & West Branch Ry. v. Swank, 105 Pa. 555 (1884); Kemp v. Pennsylvania R. R., 156 Pa. 430 (1893).

² Hoffeditz v. Southern Pennsylvania Railway & Mining Co., 129 Pa. 264 (1889).

³ Pennsylvania R. R. v. Friday, 4 Pennypacker, 159 (1884).

"And the said parties of the first part, for the consideration aforesaid, do for themselves, their heirs, executors, administrators, and assigns, hereby release and forever quit-claim and discharge the said second party, and its successors and assigns, from all damages or injuries of any kind, now incurred or hereafter to accrue, for or by reason of the location, construction, maintenance, and operation of the said railroad of two or more tracks, with its appurtenances, through, upon, and over and under said described land." An action was subsequently brought by the grantor's successor in title to recover damages for injuries alleged to have been sustained by the improper construction and maintenance of a culvert. It was held that the action could be maintained.¹

Release of Damages does not Convey Title.

243. A release of damages which may occur by the location and construction of a railroad, with permission to the company to enter and occupy such portion of the land as may be necessary for the construction of their road, does not convey any title to the land. If the company occupies no part of such land, there is no cloud upon the title which will justify a purchaser of the land from refusing to pay the purchase-money.²

A railroad company appropriated land and built its road thereon without objection by the owner. Subsequently, proceedings to assess damages were begun, but were finally compromised and the company was released. It was held that the title of the railroad company came not through the condemnation proceedings, but by its original entry and appropriation without objection. The release did not operate by way of an original conveyance,

¹ *McMinn v. Pittsburgh, McKeesport & Youghiogheny R. R.*, 147 Pa. 5 (1892).

² *Groh v. Eckert*, 3 Brewster, 116 (1869).

but by way of a discharge for the damages incurred by the entry and construction of the railroad.¹

Deeds.

244. An owner of land entered into the following agreement with a railroad company: "*In consideration of four hundred and fifty dollars, payable as hereinafter stated, with interest in full, for right of way and all claims of damages*, the said party of the first part agrees and binds himself to convey to said party of the second part, by a good and sufficient deed, in fee-simple, with covenant of general warranty, the following property, situated in the county of Washington, and State of Pennsylvania—that is to say, a strip of land extending from the west boundary of Clayville Borough, along the centre line of the said railroad, to the property of George W. Bodkin, being at the south side of Back Alley, and in width thirty-three feet on each side of the centre line, in addition to the grounds occupied by the slopes of cuts and fills, but narrowing in width on the north side, so as not to embrace the alley. Upon the delivery of the said deed, duly acknowledged for record at any time after the expiration of five years from this date, the said Hempfield Railroad Company agrees to pay the said party of the first part the said sum of four hundred and fifty dollars, with interest from date." The part of the agreement in italics was written, the rest was print. It was held that the plain intent of the parties was to contract for a conveyance of the strip of land in fee, and not merely of a right of way.²

A deed to a company for the purpose of constructing a railroad on the land conveyed provided that the road should "not interfere with buildings on said land," does

¹ Lawrence's Ap., 76 Pa. 365 (1875).

² Wheeling, Pittsburgh & Baltimore R. R. v. Gourley, 99 Pa. 171 (1881).

not authorize the construction of the road so near to the buildings as to endanger their safety or destroy their usefulness.¹

A deed to a railroad company conveyed land upon which there was an old established road leading to a saw-mill. In the agreement of sale the use of this road was reserved, but in the deed no mention was made of the reservation. Subsequently, the railroad company obstructed the road. It was held that the owner could recover in trespass.²

A grantor of lands to a railroad company alleged a contemporaneous agreement with the agent of the company to reconvey a portion of the lands. The grantor's evidence was corroborated by evidence of the subsequent occupation by the company of the land which was to be reconveyed and by a subsequent deed to the grantor by the agent of the company in his individual capacity for the land. It was held that the evidence was sufficient upon which to support a decree for a reconveyance against the company.³

Nature of the Estate Acquired.

245. The estate of a railroad in land conveyed to it for the purposes of a railroad is such that, although the grantor, having the reversion, executes a deed of dedication of the land as a street, the construction of the street at grade across the road-bed of the railroad will, at the instance of the company, be restrained by injunction until the street has been opened by proceedings in the Court of Quarter Sessions and security for damages given to the company.⁴

¹ *Rathbone v. Tioga Navigation Co.*, 2 Watts & Serg. 74 (1841).

² *Pennsylvania R. R. v. Jones*, 50 Pa. 417 (1865).

³ *Erie & Pittsburgh R. R. Co.'s Ap.*, 3 Pennypacker, 164 (1882).

⁴ *Keim v. Philadelphia*, 2 Pa. C. C. R. 149 (1886).

Boundaries.

246. The construction of a track upon a part of the location of a railroad throughout its length, is the best assertion of a right to the entire width that could in the nature of railroad construction and operation be demanded. Where a railroad company has therefore laid a track upon a portion of a right of way claimed by it, the public cannot by user of a path on the right of way for more than twenty-one years, acquire a passage-way adverse to the title of the company. "By the side of every railroad tract extending throughout the country beaten paths may everywhere be found, daily used and traveled upon by the public and enjoyed as the easiest and most convenient thoroughfare, for such in reality they become. And yet the thought is never entertained that the public, by the most constant and most continuous use of such ground, acquires an indefeasible title to it. The reason is palpable. The presence of the railroad tracks constantly in use is the defiant badge of ownership. It is the only practical assertion of title that can be made. The rule does not differ because the location of a road is through a more populous district, in this case through a borough, whose citizens have availed themselves of the convenience of using the ground along the railroad track, notwithstanding the railroad ties and rails of the company may not have spanned and bound literally with an iron grasp from one side to the other, its authorized domain."¹

A land-owner conveyed to a railroad company all the land upon which the said "railroad was located and about being constructed," but did not define the boundaries by courses and distances. The railroad company was authorized by its charter to enter upon and occupy lands not

¹ *Pennsylvania R. R. v. Freeport Borough*, 138 Pa. 91 (1890).

exceeding four rods in width. In a contest forty years afterward between the railroad company and a neighboring owner claiming under the land-owner who had conveyed to the railroad, it was held that it could not be presumed in the absence of proof that the company had actually included the four full rods in width in its original location. In such a case evidence that the original land-owner under his agreement with the railroad company, made and kept a fence on his adjoining land along the railroad, and that this fence was maintained for forty years, was admissible to show the boundary line between the railroad company's property and the adjoining land.¹

If a railroad company acquires its right of way by purchase, but takes no deed defining the boundary, the company will be confined to the land actually taken and occupied by it, and the limits of such occupation may be shown by fences set up by the property-owner and by boundary stones set up by the company itself.²

On a bill in equity to prevent a building from being constructed within the lines of a right of way of a railroad company, a preliminary injunction will not be granted if the defendant denies the title of the railroad company to the property.³

Agreements as to Stations.

247. If a railroad company agrees to erect a station upon land in consideration of a release of the right of way through the owner's land, the company is bound to erect the station, and parol evidence that its erection was the consideration for the release is admissible. In such a

¹ Philadelphia & Reading R. R. v. Obert, 109 Pa. 193 (1885).

² Goddard v. Philadelphia & Baltimore Central R. R., 2 Lancaster L. Rev. 265 (1885).

³ Delaware, Lackawanna & Western R. R. v. Newton Coal Mining Co., 137 Pa. 314 (1890).

case the measure of damages for the failure to erect the station is the additional value that would have accrued to the plaintiff's land if the station had been built. "Under the contract, whatever specific advantages would accrue to the land from the adjacent depot and station, would have to be added to the plaintiff's claim, for this would be his loss in case of a breach of the contract. While the profits of his business cannot be added to his damages, which constitute the characteristics of the land and give it value, they are not to be thrown out of consideration in determining the value of the land. Clearly, if the depot and station would make the plaintiff's land more valuable as a place of business, by bringing to it business it would not possess without them, they give greater value to the land to the extent of the increase by reason of their being placed there, and therefore fall within the scope of the contract. They were the thing bargained for, and the consequent loss would fall within the damages to the extent they would have added to the value of the land."¹

Where a railroad company violates an agreement to build a station in consideration of a gift of land on which the station was to be built, the measure of damages is not the value of the land, but the loss sustained by the failure to erect the station.²

Agreements as to Sidings.

248. Mere permission by a railroad company to the owner of a siding to maintain a frog and switch, and the receipt by the railroad company of money from the owner for repairs, does not give the owner of the siding an irrevocable right to maintain the frog and switch. AGNEW, J.,

¹ Per AGNEW, J., in *Watterson v. Allegheny Valley R. R.*, 74 Pa. 208 (1873).

² *West Chester & Philadelphia R. R. v. Broomall*, 2 Delaware County, 501 (1886).

said: "It is not the siding into the plaintiff's lot, but the obstruction in the track, which interferes with the company's rights. The switch is an opening directly in the line of the track, breaking its continuity, exposing the company to the dangers of accident, and imposing the expenses of guarding and maintaining its proper relation to preserve a continuous rail. So the frogs lie directly in the line of travel, obstructing its free use, and causing great wear and tear of machinery. How can it be supposed a company chartered to build a highway for the conveyance of passengers and the transportation of merchandise intend, when it suffered this direct interference with its track, to concede a right to maintain it forever, no matter what might be the increased demands of travel and trade and the changes of business? How can it be supposed that the plaintiff himself, who must be presumed to know the public objects of such a highway, would be so misled as to believe he was acquiring an enduring right to control the use of the highway to his private ends? It is inconceivable that any one should think that a mere act of sufferance would vest in him a permanent title to maintain an opening and a damaging obstruction to the track free of all charge. There is no agreement, and, not being misled, there can be no estoppel. In order that the improvements on his own lot to adapt it to his trade should operate, he must convince us that they were induced by such acts and representations of the defendants as warranted him fully in believing that the right conceded to him was such as he sets forth in his bill.

"This case differs totally from those instances of privilege in or upon private property granted by individuals having an absolute dominion over their own estates, fettered by no public duty, where the expenditure of money

in pursuance of the license can be accounted for on no other presumption than that of a mutual understanding that the privilege should remain unaltered. The nature of the property, the duties of the corporation, its limited powers, and the character of the gap in one track and of the obstruction in the other, all unite, in the absence of express agreement, to convince us that no fixed, unalterable, and unburthened privilege was conceded. Without any case precisely in point, some of the numerous citations of the defendants contain principles which assist in leading us to this conclusion."¹

In the absence of direct proof of a license, there must be an uninterrupted use of a switch for twenty-one years to entitle the user to claim as licensee.²

Agreement as to Fences.

249. If a railroad company agrees to build and maintain a fence on both sides of its right of way through a farm, and the company builds the fence, but fails to maintain it, the measure of damages for the breach of the contract is the annual cost of keeping and maintaining the fence.³

An agreement between a railroad company and a landowner was as follows: "I hereby agree in behalf of the railroad to be constructed along the Big Fishing Creek, from a point near its mouth and following its general course to Cole's Creek, thence by the most eligible route along the gorge of its eastern branch into Sullivan County, to connect with the State Line & Sullivan Railroad, to be extended to the State line at or near Waverly, that I will release to the company which undertakes to construct

¹ *Heyl v. Philadelphia, Wilmington & Baltimore R. R.*, 51 Pa. 460 (1866).

² *Heyl v. Philadelphia, Wilmington & Baltimore R. R.*, 6 Phila. 42 (1865).

³ *Erie & Pittsburgh R. R. v. Johnson*, 101 Pa. 555 (1882).

such road the right of way of lawful width through my land in Orange Township, Columbia County, Pennsylvania, the damage to be assessed when the road is located and the amount of said damages to be paid in stock in said railroad. Cost of fencing not included in damages, provided no damage is done my buildings, race or water-power." It was held that under the proviso in the agreement that the cost of fencing should not be included in damages if no damage was done to the buildings, race-course, or water-power. The proviso, however, did not prohibit the company from interfering with the water-power and race-course.¹

Plaintiff executed a deed of release of right of way to a railroad company. He claimed that the railroad company agreed by parol to pay a fair and just compensation for the same, and to fence its line or pay the plaintiff sixty cents per rod for fencing and pay plaintiff all damages sustained by him from the construction of the road. The case was left to the jury to determine whether the parol agreement, claimed by plaintiff, had actually been made. A verdict and judgment for defendant was sustained.²

Agreement to Pay Money to Secure Particular Location of Road.

250. An agreement to pay a railroad company a certain sum of money as an inducement to locate the route of the railroad at a particular place, is not against public policy and may be enforced. GIBSON, C. J., said: "If, then, the right to decide a question of location is a corporate one, it is paramount even to the public convenience; and there is abundant reason that it should be so. A

¹ Hoffman v. Bloomsburg & Sullivan R. R., 143 Pa. 503 (1891).

² Lohr v. Somerset & Cambria R. R., 2 Mona. 507 (1888).

company is not bound to make the best road, and upon the best ground that can be had by an unlimited outlay ; it is enough for the public that it does the best with its means. The sum subscribed is usually inadequate to the end, and it would surely not promote the public convenience to preclude recourse to any other means which might be put by accident within its reach. As inducements to the undertaking, contributions on the ground of individual, as well as of corporate interest, may be legitimately calculated upon. Without the purchased assistance of a part of the inhabitants of Harrisburg, this company might possibly have been unable to construct any bridge at all.”¹

Acquiescence of Land-Owner.

251. If a land-owner consents to the entry of a railroad company, and sees the expenditure of large sums of money made upon the land in the construction of the line of railroad, part of an extended line over which the corporation was engaged in carrying passengers and freight as a common carrier, he cannot subsequently be permitted to treat the entry as a trespass. He does not, however, lose his right to compensation, and may proceed under the statute to have his damages assessed as well after as before the construction of the railroad, and if he has not been secured or paid, he may even under such circumstances, maintain an action of ejectment. The railroad company, however, in the latter case is entitled to a reasonable stay of execution to enable it to condemn the land as of the date of its entry, by proper proceedings under the statute. The effect of the permissive entry was the same as if a former contract had been entered into by which the land-owner had agreed to put the cor-

¹Cumberland Valley R. R. v. Baab, 9 Watts, 458 (1840).

poration in the possession, and accept as compensation such sum as might be awarded to him by proceedings under the general law. This protects the corporation in the expenditure made in consequence of its lawful entry on the land, while it secures to the owner a full measure of compensation, to which he is entitled under the law for the entry and the appropriation by the corporation.

A railroad company entered under a formal release of the right of way by a widow, who was in actual possession of and the holder of the estate for life in the land, and with the knowledge and acquiescence of the guardian of minor remainderman. It was held that the entry was not a trespass, but was rightful, subject only to an ascertainment of the damages done to the remainderman.¹

Under an agreement in writing under seal with the owner of land subject to a mortgage, a railroad company was permitted to construct a Y upon the land, in consideration of a certain sum of money. The land was subsequently sold upon a judgment obtained on the mortgage. The purchaser at this sale, and those claiming title under him, for a period of twenty years, recognized the continued use of the Y by the railroad company. It was held that after such a long acquiescence in the use of the Y, that it would be inequitable for the court of equity to require the company to take up its tracks.²

If the entry is made under a grant from an alleged owner, a subsequent grantee of the real owner may afterward maintain ejectment against the company. In such a case the action is not personal to one who owned the land when it was so taken. If at the time the grant was made the railroad company or its agent knew that another person than the grantor has title, the real owner

¹ *Oliver v. Pittsburgh, Virginia & Charleston Railway*, 131 Pa. 408 (1890).

² *Chambers v. Baltimore & Ohio R. R.*, 139 Pa. 347 (1891).

though he may have not objected to the construction and operation of the road, is not estopped from subsequently asserting his title by action of ejectment. The execution, however, in such a case will be stayed for a sufficient time to enable the railroad company to condemn the right of way under the power of eminent domain.¹

Where a land-owner knowingly permits a railroad to be constructed, the court will order a stay of execution so as to permit condemnation proceedings by a railroad company.²

Although a land-owner can so act by silence or by positive acts toward a railroad company as to estop him from asserting his legal title, yet the evidence of the facts to sufficiently estop him must be clear. Thus the mere knowledge that a railroad was built upon his land is insufficient.³

Where a land-owner acquiesces while a railroad is being built, he is not entitled to a preliminary injunction to restrain the company from using its tracks.⁴

Where the owner of land stands by and looks on while a railroad company enters upon his land under color of title, expends large sums of money, and makes valuable improvements, without objection, he is estopped in equity.⁵

Duty of Viewers to Pass upon Agreement to Release Damages.

252. The court will appoint viewers although the petitioner has executed a release of damages to the railroad company, if there is a dispute as to whether the release has covered the damages in question. In such a case, it

¹ *Richards v. Buffalo, New York & Philadelphia R. R.*, 137 Pa. 524 (1890).

² *Allegheny Valley R. R. v. Colwell*, 2 Mona. 300 (1888).

³ *Allegheny Valley R. R. v. Colwell*, 2 Mona. 300 (1888).

⁴ *Grey v. Ohio & Pennsylvania R. R.*, 1 Grant, 412 (1856).

⁵ *Bell v. Ohio & Pennsylvania R. R. Co.*, 25 Pa. 161 (1855).

is for the viewers to pass not only upon the question of damages, but upon the effect of the agreement, and whether it relieved the railroad company from the payment of damages. If an appeal is had to court, then, upon the trial, the question can be presented whether the plaintiff had agreed to convey to the railroad the land over which the road was constructed and thereby relieved the railroad company from the payment of damages, or whether the road had been located on other lands.¹

"It is for the viewers to say, under the express direction of the act 'whether any, and if any, what amount of damages has been sustained' by the plaintiff; and for us to say that the plaintiff has not sustained any damages, because he has released them, as defendant asks us to find, would be a clear usurpation of their functions. If it be true that the plaintiff has released all damages to the defendant, then he has sustained no damage, and it would be the duty of the jury of view to so report, upon satisfactory proof of the release. . . . There may be ground for the fear expressed by the learned counsel for the defendant that the question of release or no release will not receive fair trial at the hands of a jury of viewers, who are too prone to give loose rein to their prejudices against corporations; but if so, we are powerless to prevent it. They are the tribunal, and the only one nominated by the law, to pass upon the question of damages between the plaintiff and defendant, and in passing upon that question, it will be in the strict line of their duty to inquire into the scope and bearing of the release set up by the defendant."²

If the railroad company claims that the land-owner has released the company from liability for damages, it is the

¹ *Herner v. Pennsylvania Schuylkill Val. R. R. Co.*, 1 Pa. C. C. R. 43 (1885).

² *Fulmer v. Bangor & Portland R. R. Co.*, 1 Pa. C. C. R. 46 (1882).

duty of the viewers to pass upon the scope and bearing of the release set up by the company.¹

Breach of the Agreement.

253. If a land-owner agrees to give his land for railroad purposes only, he may recover the land after the railroad company has ceased to use it for such purposes.

A land-owner submitted to a railroad company a proposition that if the company would agree to bring its road and car-house to a point adjoining his hotel property, he would agree to relinquish all claim for damages for a strip of land adjoining, "so long as said company may occupy said ground and alley with their tracks and car-house." The company accepted the proposition, and built its track and car-house upon the land. Subsequently the railroad company abandoned the land for the use of its railroad. It was held that the land-owner's vendee had a right to recover the land. BUTLER, P. J., said: "The company entered upon the property in pursuance of its charter, and its rights were such as the charter and this entry confer. The paper signed by Mr. McClellan was a proposition to release his right to damages in case the company should enter. It is such, not only in substance, but in plain, unequivocal terms: 'In case the railroad company bring their road, . . . I agree to relinquish all claims to damages.' The effect of the entry was precisely the same as if it had been adverse and the damages assessed under the charter or settled by agreement. And this, doubtless, would have been so even if Mr. McClellan's agreement had borne much closer resemblance to a grant. (Redfield on R. R., § 105.) The result would

¹ Fulmer v. Bangor & Portland R. R., Lehigh Valley L. Rep. 129 (1885).

probably not have been different, however, if the view were adopted that the proposition, after acceptance, is to be treated as a grant. In either case, the company acquired a right to occupy the property for railroad purposes as contemplated and authorized by its charter, and nothing more. In assessing damages under an adverse entry, Mr. McClellan would have been charged with the advantages likely to accrue; and, in agreeing to release, these advantages were the inducing motive. If the company has abandoned the use of the property for railroad purposes, the consideration of the release is lost, and, if the advantages had been charged against him in an assessment under the charter, the loss would be as great. The rights of the company are gone; not, however, because the consideration of the release is lost, but because the right of occupation (whether it be referred to the agreement or the charter) is limited to that particular use. An abuse of the right, as by applying the property to a different use, would not work a forfeiture. The public interest forbid such a result."¹

A land-owner granted to a railroad company's predecessor in title certain land and water rights, provided that, "if ever said lot and water right, and their buildings, fixtures, and other appurtenances, or either of them, should not be any longer needed for the purposes for which they are granted," then and in that case the said lot, water right, privileges, and appurtenances, or either of them so abandoned, "shall immediately revert to the donors, their heirs and assigns, and become a part of the real estate and its appurtenances from which they are hereby separated, as if it or they had never been given to the State." It was held that, up to the time of the actual abandonment, the railroad company could remove

¹ *Guss v. West Chester R. R.*, 1 Chester County Rep. 363 (1878).

the machinery from the land and was not accountable to the grantor's heirs therefor.¹

A railroad company contracted by articles for land and entered under the articles. Having failed to pay the purchase-money according to the articles, the court decreed specific performance, with leave for the vendor to issue execution, if the purchase-money found to be due should not be paid at the time fixed in the decree. The money not being paid, execution was issued, under which the whole tract was sold. Before the sale the company had laid a track, etc., on a strip of the land. The court held that the sale vested the whole interest of the company legal and equitable, including the strip occupied by the track, etc., in the sheriff's vendee, subject to no easement by the company.²

Injunction to Enforce Agreement.

254. A railroad company will not be restrained by injunction from locating and constructing its road in a particular place, because it is under an agreement with a land-owner to build it elsewhere.

In *Gallagher v. Fayette County R. R. Co.*,³ a land-owner entered into a written agreement with a railroad company in which it was recited that "whereas the Fayette County Railroad Company have determined to select grounds for a depot and station-house, on the land of the said John Gallagher, in the borough of Uniontown, Fayette County," it was agreed in consideration of the advantages to the complainant, and one dollar, to grant a right of way three rods wide over his land for the construction of the road "into, across, and from said depot, at the northern and southern end," and also, to convey

¹ *Pennsylvania R. R. Co. v. Parke*, 42 Pa. 31 (1862).

² *Pittsburgh & Steubenville R. R. v. Jones*, 59 Pa. 433 (1868).

³ 38 Pa. 103 (1860).

one and a half acres of land for the purposes of a depot and station. The complainant's bill charged breaches of the contract in several particulars, but especially, in that the company had purchased another lot of ground whereon to erect a depot and other buildings, and threatened to erect them there, and prayed that they might be restrained from erecting depot buildings on any other than the acre and a half of the complainant, and that they might be compelled to relocate their road, so as to pass directly through the acre and a half, as it was alleged they had agreed to do. THOMPSON, J., said: "It would exceed all precedent to restrain a railroad company from progressing with their work, because they may have violated some contract with some one with whom they may have bargained. If the track of the road has been laid down in violation of the bargain, a court of law will redress it; and if the ground be used in violation of permission, or without the right being acquired according to law, there are appropriate remedies to redress the wrong, under the contract or under the Act of Assembly for assessing damages. If the company do not use the acre and a half for a depot, the complainant will not be obliged to convey it, or if they use and occupy it under the permission to enter on it given by the contract, they must pay for it or give it up. We said in *Pusey v. Wright*, Casey, 387, that we should not for a breach of the contract restrain the company from the use of the road. This case presents about the same proposition; that is to say, to restrain the respondents from erecting works elsewhere supposed to have been more useful and proper than those at first intended. We must leave the complainant to his remedy at law, or under the Act of Assembly, and if he has suffered damages for breach of contract the law will redress him."

All of the terms of the agreement must be fulfilled or the company will be enjoined. A land-owner agreed with a railroad company to relieve it from liability for land damages if it would "go on the west side of his house—against the hillside and high enough to save his water-power." The company located the railroad by the route designated, but at such a grade as to destroy the owner's water-power. The company was restrained by injunction from continuing work on the road, until it made compensation or gave security.¹

¹ *Unangst's Ap.*, 55 Pa. 128 (1867).

CHAPTER XIX.

CARRIERS OF PASSENGERS.

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| 255. Who are Passengers? | 263. Tickets Bought from Scalpers. |
| 256. Duty to Provide Seats. | 264. Ejection with Violence, or at an Improper Place. |
| 257. Regulations as to Tickets. | 265. Measure of Damages. |
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| 259. Excursion Tickets. | 267. Free Passes. |
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| 261. Tickets for Continuous Trips. | 269. Agreement to Give Pass to Landowner. |
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Who are Passengers?

255. A passenger is one who travels in some public conveyance by virtue of a contract, expressed or implied with the carrier, as by the payment of fare or by that which is accepted as the equivalent thereof.¹

Every one riding in a railroad car is presumed *prima facie* to be there lawfully as a passenger, having paid, or being liable when called on, to pay his fare, and the onus is upon the carrier to prove affirmatively that he is a trespasser.²

The conductor of private freight cars not in the employ of a railroad company is in the position of a passenger. Such a person while in charge of his cars, at the

¹ *Bricker v. Philadelphia & Reading R. R.*, 132 Pa. 1 (1890); *Pennsylvania R. R. v. Price*, 96 Pa. 256 (1880). See NEGLIGENCE.

² *Pennsylvania R. R. v. Brooks*, 57 Pa. 339 (1868); *Creed v. Pennsylvania R. R.*, 86 Pa. 139 (1878).

request of the railroad company's conductor, cut loose the cars following his own, and fell off the train and was injured. The court charged that if the "injury was not caused by drawing the bolt, but by the negligence or misconduct of the engineer in increasing the motion of the cars with a violent, unnecessary, and unusual jerk, after the plaintiff had resumed his proper position on the car, such as he could not anticipate and guard against, he might recover." The court held that the instruction was proper.¹

Plaintiff was employed by an officer of a railroad to work on a bridge. Under his contract of employment he was to be carried to and from his home to his work. He rode in the baggage car and at the request of the conductor helped to load and unload freight. While riding in the baggage car he was injured by the negligence of one of the company's servants. The court held that he was a passenger and not an employee within the rule that he could not recover for injuries caused by the negligence of a fellow-servant.²

Duty to Provide Seats.

256. As a general rule, and under ordinary circumstances, it is the duty of a railroad company to provide every passenger with a seat, and that if a passenger, exercising reasonable care and prudence, is injured in consequence of the company's neglect in this regard, the company must respond in damages.³

A railroad company has no right to eject from a sleeping car, a person who has taken a seat in the car after failing to find a seat elsewhere in the train; but a verdict of \$8,500 for the expulsion of such passenger is excessive.⁴

¹ *Cumberland Valley R. R. v. Myers*, 55 Pa. 298 (1867).

² *O'Donnell v. Allegheny R. R. Co.*, 50 Pa. 490 (1865).

³ *Camden & Atlantic R. R. v. Hoosey*, 99 Pa. 492 (1882).

⁴ *Le Van v. Pennsylvania R. R.*, 3 W. N. C. 496 (1876).

Regulations as to Tickets.

257. Railroad companies may make reasonable regulations, not only as to the amount of fares, but as to the time, place, and mode of payment. Thus a regulation requiring the payment by passengers who neglect to procure tickets, of ten cents in addition to the regular fare, to be refunded on presentation at the ticket office of a check therefor, is valid. The additional sum in such a case, is not a charge for transportation, within the meaning of a provision in the company's charter limiting transportation charges to a certain rate per mile. In such a case, MITCHELL, J., said: "The regulation in question in the present case, is not in itself unreasonable or oppressive. In regard to the traveler, it is scarcely just ground of complaint that he has to present his refunding ticket at the end of his journey, instead of getting an ordinary ticket at the start. The inconvenience, if any, is the result of his own default. With reference to the other passengers, and still more to the railroad company, the regulation is conducive to the rapid, orderly, and convenient dispatch of the conductor's part in the collection of fares, and thus leaving him free for the performance of the other duties in connection with the stops at stations, the entrance and exit of passengers, and the general supervision of the safety and comfort of those under his care.

"If, therefore, the company may refuse to carry at all without a ticket, it may fairly refuse under the far less inconvenient alternative to the traveler of putting him to the trouble of going to an office to get his excess refunded. If the company may charge those failing to get a ticket an additional price, and keep it, certainly they may charge such price and refund it; and, as the regulation is not in itself unreasonable or oppressive, or needlessly inconvenient to the traveler, its validity, upon general

principles and on authority, would seem to be beyond question.

"These views were conceded by the learned judge below, and are not seriously questioned by counsel here. But the decision was based upon the view that the extra ten cents imposed by this regulation is a part of the fare, and makes it higher than the rate allowed by the act of incorporation of the company. The language of the act is, 'In the transportation of passengers no charge shall be made to exceed . . . three and one-half cents per mile for way passengers.' As the distance from East Liberty station to the Union station in Pittsburgh is four and a half miles, and the regular fare fourteen cents, it is admitted that the extra ten cents is in excess of the charter rate, if it is a 'charge for transportation' within the meaning of the act. Should it be so regarded? 'Charge' is a word of very general and varied use. Webster gives it thirteen different meanings, none of which, however, express the exact sense in which it is used in this charter. The great dictionary of the Philological Society, now in course of publication, gives it twenty separate principal definitions, besides a nearly equal number of subordinate variations of meaning. Of these definitions one (10 b) is, 'The price required or demanded for service rendered, or (less usually) for goods supplied;' and this expresses accurately the sense of the word in the present case. The essence of the meaning is that it is something required, exacted, or taken from the traveler as compensation for the service rendered, and, of course, something taken permanently, not taken temporarily, and returned. The purpose of the restriction in the charter is the regulation of the amount of fares, not of the mode of collection; the protection of the traveler from excessive demands, not interference with the time, place, or mode of

payment. These are mere administrative details, which depend on varying circumstances, and are therefore left to the ordinary course of business management. We fail to see anything in the present regulation which can properly be treated as an excessive charge, within the prohibition of the charter.

“Nor is there any force in the objection that this regulation is unreasonable. It is said not to be general, fair, and impartial, because it provides that as to passengers getting on the train at stations where there is no ticket office, etc., or on trains where, on account of the excessive rush of business, it is impossible to issue the refunding check, the collection of the excess shall be omitted. The objection overlooks the necessary qualifications to the validity of such a regulation. All the cases are agreed that the regulation would be unreasonable, and therefore void, unless the carrier should give the passenger a convenient place and opportunity to buy his ticket before entering the train. This part of the regulation merely puts in express words a necessary exception which the law would otherwise imply. So, as to the excessive rush of business. Reasonableness depends on circumstances. To collect the extra amount and issue return checks to as many passengers as the conductor could reach in time, and let all others go free entirely, would be much more unreasonable than to treat all alike and dispense with the regulation for the time being. Necessity modifies the application of all rules, and there is nothing unreasonable in requiring the conductor to exercise sufficient foresight to see whether he can perform the prescribed duty in the available time, and investing him with the discretion to omit it altogether, if, in his judgment, he cannot perform it fully.”¹

¹ *Reese v. Pennsylvania R. R.*, 131 Pa. 422 (1890).

A regulation requiring an additional fare to be paid on the train if a ticket was not procured at a station is reasonable.¹

It is a reasonable regulation of street railway companies to require passengers to place their fares in a Slawson box. If a passenger refuses to do so, and is ejected from a car, he cannot recover damages.²

But if a passenger has dropped his fare into a box in obedience to a posted rule of the company, and without knowledge of private directions given to the drivers to personally collect the fares when the car is crowded, he cannot be lawfully ejected from the car for refusing to pay his fare the second time.³

A passenger who has been in the habit of riding on a railroad must be notified of any change in the rules relating to passengers. Thus a passenger was in the habit of riding on way freight trains. Subsequently the company made a rule that "passengers will not be carried on way trains unless they are provided with tickets. Way freights will not stop at stations where tickets are not sold to receive nor let off passengers." It was held that the passenger could not be removed from a way freight car at a distance from a station without proof of express notice or actual knowledge of the rule. The posting of notices of the rules in the station-house was not sufficient.⁴

Although one who enters a train may have purchased a ticket entitling him to a ride thereon, a conductor is entitled to have proof of that fact by seeing the ticket; and if, being unable to produce it, he refuses to pay fare, he may be ejected; but an actual tender of the fare before

¹ *Ritter v. Philadelphia & Reading R. R.*, 2 W. N. C. 382 (1876).

² *Lackman v. Union Pass. Ry.*, 1 W. N. C. 446 (1875).

³ *Perry v. Pittsburgh Union Pass. Ry.*, 153 Pa. 236 (1893).

⁴ *Lake Shore & Michigan Southern Ry. v. Greenwood*, 79 Pa. 373 (1875).

the train is stopped to eject him, by whomsoever made, must be accepted.¹

Duty of Passengers to Know Regulations.

258. It is a passenger's duty to ascertain whether his ticket entitles him to a passage on a particular train before going upon it; and if he enters a train without a proper ticket the company has a right to eject him, at a safe place, using no more force than necessary. If in such a case the passenger fails to inform himself of the regulation, and enters a train in good faith, thinking that he may properly ride upon it, the railroad company cannot treat him as a trespasser.²

A passenger offering a ticket which entitles him to ride to a station at which the train does not stop, and refusing to pay his fare to the next station at which the train does stop, which is beyond the station which he wishes to alight, cannot recover damages for being ejected from the train before reaching the station called for in his ticket. GUNNISON, P. J., said: "Bearing this well-established principle in mind, it is clear that the plaintiff's right was to be transported from Erie to North East upon the train, which, under the schedule, stopped at both places. He had no right to take passage upon a train which did not regularly stop at North East and require the defendant to stop the train for his accommodation at that place. Moreover, he was bound to ascertain what train did stop at North East. The defendant was not bound to give him particular notice. It could only be required to furnish the means by which he, upon inquiry, could ascertain, and the duty of inquiry devolved upon him. If, without the inducement of the agents of the railroad

¹ *Ham v. Delaware & Hudson Canal Co.*, 142 Pa. 617 (1891).

² *Lake Shore & Michigan Southern Ry. v. Rosenzweig*, 113 Pa. 519 (1886).

company, he mistook the train and boarded one which, by the rules and regulations, did not stop at the station he was bound for, he cannot visit upon the company the consequences of his mistake. The facts found by the learned arbitrator are, that he did not perform the duty of acquainting himself with the regulations governing the running and stopping of the train he took passage on in Erie, and that he was not misled by the agents of the company. He could not, therefore, require the train to be stopped at the place of his destination."¹

A passenger is bound to take notice of the conditions printed upon his ticket.²

Excursion Tickets.

259. If a purchaser of a round-trip excursion ticket, not limited by its terms, is not notified at the time of the purchase that the ticket is not good after a certain date, he may use the return coupon at any time. He is not bound to make inquiry of the company as to the regulations covering such a ticket, nor is he affected by public notice of such regulations where personal notice is not brought home to him.

Plaintiff purchased from defendant a ticket upon which was printed the following: "Pennsylvania Railroad Company. This excursion ticket entitles the bearer to one trip to Philadelphia, Pa., and return. This ticket is void unless officially stamped and dated. In selling this ticket over roads, this company acts only as an agent, and assumes no responsibility beyond its own line. . . . The checks belonging to this ticket will be void if detached."

Attached to the ticket was a check, as follows, viz.:

¹ *Caldwell v. Lake Shore & Michigan Southern R. R.*, 8 Pa. C. C. R. 468 (1890).

² *Cresson v. Philadelphia & Reading R. R.*, 11 Phila. 597 (1875).

"Pennsylvania Railroad Company. Phila. & Erie R. R. Div. One first-class passage, Sunbury to Williamsport. This check is not good if detached. Philadelphia, Pa., and return." Also another check, which reads as follows: "Issued by Pennsylvania Railroad Company on account of Northern Central Railroad. One first-class passage, Harrisburg to Sunbury. This check is not good if detached. Philadelphia, Pa., and return." Stamped on the back of the ticket was the following: "Pennsylvania Railroad Company, 237, Passenger Department, Pennsylvania R. R. Office, Aug. 22, Williamsport."

The ticket, of which the foregoing was substantially a copy, was purchased by plaintiff, in 1879, on the day it bore date, at the company's office in Williamsport, and immediately used by him in traveling thence to Philadelphia. The going checks were used in making that trip. Having the ticket with return checks still attached thereto in his possession, he left Philadelphia, in November, 1881, intending to use the same in going thence to Williamsport. He experienced no difficulty until he reached a point on the Northern Central Railroad east of Dauphin, where he offered the ticket for passage to Sunbury, and thence to Williamsport, but the conductor refused to receive it, on the ground that the time within which it might have been used had expired, and insisted on payment of the usual fare. That demand not having been complied with, the train, after making its usual stop at Dauphin, was again stopped some distance north of the station, and plaintiff below was ejected therefrom for non-payment of fare. There was nothing on the face of the ticket to indicate that it was limited as to time, nor was there any competent evidence, *dehors* the ticket, to prove any such limitation and notice thereof to plaintiff below. The offer to prove that, prior to the sal

the ticket in 1879, public notice was given, at the place where it was purchased, that such tickets were "sold from June 1 to October 1, good to return until November 1," of that year, and that similar notice was given by circulars there and elsewhere, was rejected, and it was held that plaintiff was entitled to recover.¹

If the return coupon has been negligently collected by the conductor on the first journey, the passenger cannot be ejected on the return journey.

Plaintiff purchased an excursion ticket between Everson and Ohio Pyle Falls. On the journey to Ohio Pyle Falls, the conductor took up both the going and return coupons and gave to plaintiff a conductor's trip check. On the return journey, plaintiff offered the conductor's check to the conductor on the return train, who refused to accept it. Plaintiff paid her fare to Connellsville, but did not sufficient money to pay to Everson, which was about eight miles from Connellsville. She was required to leave the train at Connellsville, and was compelled to walk the remaining distance in the evening to her home. She testified that she walked home on the railroad track, and that she fell several feet through a trestle and hurt herself and was ill for ten days afterward. A verdict and judgment for \$1,500 was sustained.²

The mere fact that other persons were allowed to ride on overdue coupons does not deprive the company of the right to refuse such coupons.

Plaintiff claimed damages for being ejected from plaintiff's train. Defendant pleaded that plaintiff had offered an excursion ticket good only on another day which was refused. Plaintiff replied that defendants offered to carry plaintiff and others holding such ticket, on other days

¹ *Pennsylvania R. R. v. Spicker*, 105 Pa. 142 (1884).

² *Baltimore & Ohio R. R. v. Bambrey*, 2 Mona. 109 (1888).

than on the day of issue. It was held that defendants were entitled to judgment on demurrer.¹

Commutation Tickets.

260. If a person holding a monthly commutation ticket at a reduced rate does not use the whole of his ticket and attempts to recover upon the unused portion, the special contract evidenced by the ticket is rescinded, and the holder is placed in the position of a person traveling on an ordinary ticket. A monthly railroad ticket between Norristown and Philadelphia entitled the holder to ride sixty times during the month, but provided that no rebate should be allowed for partial use from any cause. At the rate at which the ticket was sold each trip cost thirteen and a quarter cents; the regular fare was fifty cents. The plaintiff did not use the whole of the ticket, but the usual fare for the number of trips actually made on the ticket, exceeded the whole amount paid for the ticket. It was held that even if the Act of May 6, 1863, P. L. 582, requiring railroad companies to redeem unused tickets, applied to the case, the plaintiff could recover nothing, as there was no difference due her. WEAND J., said: "It is claimed that the Act of May 6, 1863, P. L. 582, and the amendment thereto of April 10, 1872, p. 51, compels the defendant company to redeem the unused portions of these tickets. The Act of 1863 provided that 'it shall be the duty of the owner or owners of railroad, steamboat, and other public conveyances to provide for the redemption of the whole, or any parts, or coupons of any ticket or tickets as they may have sold, as the purchaser, for any reason, has not used and does not desire to use, at a rate which shall be equal to the difference between the price paid for the whole ticket

¹ *McElroy v. R. R. Co.*, 7 Phila. 206 (1870).

and the cost of a ticket between the points for which the proportion of said ticket was actually used.' The amendatory Act of 1872 provides: 'And it shall be the duty of the said company to pay for such unused portion of ticket the difference between the actual fare to the point used and the amount paid for such ticket.'

"The defendant contends that this act does not apply to the kind of tickets here in dispute. We are not clear that this contention is not good; but it is not necessary now to decide the point, for, even admitting that it does not apply, the plaintiff cannot, under its provisions and the facts of this case, recover.

"The benefits of the act are in favor of the purchaser of a ticket. It allows him to buy a ticket at a reduced rate, but if he shall not use the same he can receive back his money less the regular fare which he otherwise would have had to pay for the distance traveled. In other words, if he does not use the whole of his ticket, the special contract evidenced by the ticket is rescinded, and he then is treated as a person traveling on an ordinary ticket. In each month this plaintiff used her tickets so often that in each case the regular fare more than amounts to the price paid by her for the whole ticket, and hence there is no difference due her. To hold otherwise would be unjust and contrary to the agreement of the parties. Otherwise a person, in order to avoid payment of the regular fare, fifty cents, could purchase a monthly ticket, ride once, and by having the balance of the ticket redeemed, as is here claimed, only pay thirteen and a quarter cents for his ride, whereas another person who bought a trip ticket would pay fifty cents.

"The act requires the payment to be 'at a rate which shall be equal to the difference between the price paid for the whole ticket' (in this case \$7.95) 'and the cost of a

ticket between the points for which the proportion of said ticket was actually used' (in this case fifty cents). As the cost of a ticket between the points for which a portion of this ticket was used was fifty cents, and as the plaintiff traveled between these points on each ticket more than twenty times, she is still the gainer. In each month the aggregate of the cost of a ticket for each trip between the points for which she used her ticket, as per her statement passed us, exceeds the amount she paid for the whole ticket, and hence there is nothing due even under the most favorable construction of the act, even if applicable to her case.

"The Act of Assembly was passed 'to prevent frauds upon travelers,' and also to prevent frauds 'upon railroads and other corporations by the fraudulent use of tickets in violation of the contract of purchase.' To support the contention of plaintiff we would have to hold that, under pretense of buying sixty rides during a month at a very reduced rate, a purchaser can use such ticket but once and still claim the reduced rate. The advantage would all be on the side of the purchaser and a fraud upon the company if bought for such purpose. We think the clear meaning of the act is that either the purchaser should stand by the contract as contained on the ticket, or else be placed in the position of one traveling in the ordinary way."¹

A railroad company has the right to require commuters to show their tickets, and in default to collect the fare without liability to repay it. Plaintiff entered the cars of defendants, at Beverly, New Jersey, for the purpose of making his usual daily trip to Philadelphia. He had by accident neglected to place his commutation ticket in his pocket, and when the ticket collector passed through

¹Smith v. Philadelphia & Reading R. R., 11 Pa. C. C. R. 555 (1892).

the cars, Mr. Bennett handed to him a two-dollar bill. The collector deducted thirty-five cents, the regular fare between Beverly and Philadelphia, and returned the change to Mr. Bennett, who inquired "how he should get his money back." The collector replied "that such matters must be settled at the company's office, with the general ticket agent, as his instructions were to collect the fare." Mr. Bennett accordingly went to the defendant's office with his commutation ticket and demanded the return of the fare, which was refused, because of the rule requiring the passengers who would avail himself of his privilege as a commutator to show his ticket. It was held that plaintiff was not entitled to recover.¹

Plaintiff lost his season ticket by an act of theft; he tendered indemnity, and demanded a ticket for the unexpired term; the company refused to give it; he proceeded to ride on the road without a ticket, and was, for that cause, ejected from the cars of the defendant. The ticket had indorsed upon it the following conditions:

"This ticket is not transferable, nor will any allowance be made to the within-named in case it may not be used for the whole term for which it was issued. It is subject to inspection at any time by the conductor; a refusal to comply will necessitate collection of full fare each time. It is good only for a continuous passage between the points named. If lost or mislaid it will not be replaced by the company. The holder will please return when renewing."

Upon the face of the ticket were found in small capitals these words: "For conditions see other side." It appeared from the facts agreed upon in the case-stated, that the plaintiff saved, by purchasing this ticket, \$90.30, assuming that he rode each day for six months. It was held

¹ *Bennett v. Railroad Co.*, 7 Phila. 11 (1868).

that the conditions were reasonable, and proper regulations, and not an attempt to limit the liability of the railroad company as a common carrier.¹

Tickets for Continuous Trips.

261. A railroad ticket stating on its face to be from one station to another, imports nothing but a single and continuous trip, and the holder is not entitled to make the journey between two stations by different trains. If the passenger desires to stop off he must comply with the regulations of the company in regard to stop-over privileges, and as the ticket imports a continuous passage he is bound to make inquiry as to what such regulations are.²

If, however, the journey has been interrupted by misfortune or accident, not the plaintiff's fault, he may go to his destination on a different train.³

The conductor cannot, however, after a stop-off by the passenger collect the ticket and also demand fare. A passenger bought a railroad ticket from Northumberland to Williamsport. He rode upon it as far as Milton, being less than one-third of the distance. Several days afterward he endeavored to ride upon the ticket from Milton to Williamsport. The conductor refused to permit him so to ride, took up the ticket against the plaintiff's will, and put him off the train. It was held that although the plaintiff may have abandoned his right to demand a passage upon the ticket over the untraveled portion of his journey, still the conductor had no right to take the ticket away from the plaintiff against his

¹ *Cresson v. Philadelphia & Reading R. R.*, 11 Phila. 597 (1875) (U. S. C. C.).

² *Oil Creek & Allegheny River Ry. v. Clark*, 72 Pa. 231 (1872); *Dietrich v. Pennsylvania R. R.*, 71 Pa. 432 (1872).

³ *Dietrich v. Pennsylvania R. R.*, 71 Pa. 432 (1872).

will. "The right to take up this ticket must not be confounded with a case where a person has actually ridden on the ticket the whole distance for which it calls, nor where he has obtained it in fraud of the company. In either of these cases it may be taken up. In the former the rules of the company and the implied contract in its purchase require it. In the latter the holder never had any right to its possession. In this case the conductor, under his general orders, may not have been authorized to permit the plaintiff to ride on this ticket. There was, however, nothing in good morals to prevent the defendant from permitting it to be done. There was no impropriety in the plaintiff's retaining the ticket. The conductor having ignored the plaintiff's right to ride upon it, the most he was justified in doing was to require a payment of the fare. This the plaintiff proposed to show he offered to do, but the conductor required more. He required not only payment for the ride the plaintiff was then taking, but also the yielding up of a ticket on which he was not riding. The conductor had no such right. To concede to him the right to demand of a passenger anything additional to the accustomed fare would be fraught with the most mischievous consequences. While a railroad company should be protected in the enforcement of all its reasonable rules, yet fully equal care must be taken to protect the rights of passengers from any encroachment. The plaintiff was entitled to ride upon the payment of his fare only. It was in clear violation of law to require more of him. He was justified in requiring the return of the ticket improperly withheld from him. The defendants being in fault themselves cannot enforce the right against the plaintiff which they seek to invoke."¹

¹ Per MERCUR, J., in *Vankirk v. Pennsylvania R. R.*, 76 Pa. 66 (1874).

Tickets Sold for Connecting Lines.

262. Through railroad tickets in the forms of coupons, entitling the holder thereof to pass over successive roads, usually import no contract with the company selling the same to carry such person beyond the line of its own road. They are to be regarded as distinct tickets for each road, sold by the first company as agent for the others, so far as the passenger is concerned; and when a passenger has purchased such a ticket in good faith, from an agent acting within the general scope of his employment, it is the duty of the several companies named therein to honor it until it is used or expires by its own limitation. They are bound by the statements and agreements expressed on the ticket, made by the agent selling it, as to its limit and its stop-over privileges.

On February 12, 1884, plaintiff for himself and party, purchased from the ticket agent of New York, Pennsylvania & Ohio Railroad Company at Akron, Ohio, four "special limited" tickets from that place to Philadelphia, via the Elmira & Williamsport, Philadelphia & Erie, Northern Central, and Pennsylvania Railroads. Before doing so, he informed the ticket agent that they wished to stop, *en route*, at least thirty-six hours, at Montando Junction, a short distance west of Sunbury, and was assured by him that the tickets he was about to issue would permit them to do so; that they would be good over each of the roads named in the respective coupons until midnight of February 18. The date on the margin of each ticket was accordingly punched by the agent for the purpose of limiting the time within which they could be used, to six days from date of issue. The printed contract, on the face of the ticket, declares the holder thereof agrees with the respective companies, over whose road he has to be carried, "to use the same on or before the date

as canceled by punch on the margin of this contract ticket; and, the holder hereof failing to comply with this agreement, either of said companies may refuse to accept this ticket or any of the coupons thereof, and demand the full regular fare, which the holder agrees to pay."

Attached to the ticket held by the plaintiff, as well as each of the others, were four coupons, calling respectively for "one first-class passage," "Elmira to Williamsport, via Elmira & Williamsport R. R.," "Williamsport to Sunbury, via Philadelphia & Erie Railway," "Sunbury to Harrisburg, via Northern Central Railroad," and "Harrisburg to Philadelphia, via Pennsylvania R. R." Plaintiff and each of his three companions, being provided with one of these coupon tickets, started on their journey, and, reaching Montando Junction, on the Philadelphia & Erie Railway, stopped off, as they had arranged to do before leaving Akron. On their way thither they used all the coupons except the last two named. Having purchased local tickets to Sunbury, the terminus of the Philadelphia & Erie Railroad, they checked their baggage through to Philadelphia, and resumed their journey on February 16. The local tickets were, of course, taken up on the way to Sunbury. After leaving that place plaintiff offered his through ticket to same conductor in charge of same train. He refused to receive it, and demanded full fare over the Northern Central Railroad to Harrisburg. Plaintiff then called his attention to punched date on margin of the ticket, showing that it had two days yet to run, and told him what occurred between himself and the agent from whom it was purchased; but the conductor insisted on the payment of full fare, and upon plaintiff's refusal to pay, ejected him and his companions from the car, refusing at same time to give them their baggage. After waiting several hours at a way station,

they boarded the next east-bound train. Plaintiff then offered to the conductor the rejected ticket and it was received, without objection, for passage to Harrisburg, and thence to Philadelphia. It was held, reversing the court below, that the case should have gone to the jury.¹

One who enters a train mistakenly believing that he has in his possession a ticket issued by another company, which, according to a custom of the company operating the train in question, would be accepted for passage thereon, is not a trespasser in so doing, but will become such by a refusal to pay fare when he cannot produce his ticket.²

Where a passenger is wrongfully ejected by a conductor wearing the uniform of the company selling the ticket from a car belonging to the same company, though actually running on a connecting road, and the ticket states that the selling company assumes no responsibility beyond its own line, the passenger may sue the company which sold the ticket, and if the evidence is conflicting as to whether the conductor was an employee of the defendant company or not, the case should be submitted to the jury.³

Tickets Bought from Scalpers.

263. A person who purchases a ticket in another State from an unauthorized dealer in railroad tickets may maintain an action in Pennsylvania for the refusal of the company to carry the passenger from a point in the State where the ticket was sold to a point in Pennsylvania called for by the ticket. TRUNKEY, J., said: "The Act of May 6, 1863, confers no right upon a railroad company to question passengers as to when, or where, or how they

¹ *Young v. Pennsylvania R. R.*, 115 Pa. 112 (1886).

² *Ham v. Delaware & Hudson Canal Co.*, 142 Pa. 617 (1891).

³ *Pennsylvania R. R. v. Spicker*, 105 Pa. 142 (1884).

procured their tickets, or to eject them from the cars upon suspicion that the tickets were sold to them by a person who was not an agent for the company. At common law, which is deemed in force in absence of evidence to the contrary, the contract made by the plaintiff in New York was valid. It was executed. No part remained to be performed. It vested in him the evidence of title to a passage over the railroad. His act had no savor of illegality or immorality. It was a mere purchase of the obligation of a common carrier to carry the holder according to its terms. The defendant issued the obligation, received the consideration, and became liable for performance at the date of issue. As transferee, the plaintiff claimed performance. This is the contract which is the basis of the cause of action. It is purposely made so as to entitle the *bona fide* holder to performance, and, for breach, to an action in his own name. Let it be assumed that the defendant made the contract in Pennsylvania. It is quite as reasonable to assume that tickets for passengers coming from New York into Pennsylvania were sold in New York. But wherever the contract was made, it is true, as claimed by the defendant, 'this action is to enforce not the contract between the ticket-scalper and the plaintiff in error, but between the defendant in error and the plaintiff in error.' The sale of the ticket to the plaintiff in New York was lawful. That being an executed contract, there is no question respecting its enforcement. Surely, it is not an exception to the rule that contracts, valid by the law of the place where they are made, are generally valid everywhere. Then, as the plaintiff has a valid title to the ticket, the contract between the defendant and himself is valid."¹

¹*Sleeper v. Pennsylvania R. R.*, 100 Pa. 259 (1882). See Act of May 6 1863, P. L. 582.

Ejection with Violence, or at an Improper Place.

264. Although a passenger refuses to pay his fare or produce a ticket, he cannot be ejected with such violence as will cause his death. Thus if a conductor forcibly remove the hands of such a passenger from the car railing, so that the passenger falls on the track and is killed, the company is liable in damages.¹

A railroad company owes a duty to every person who in good faith purchases a ticket and enters any of its conveyances. If the conveyance is one which by the contract the passenger has no right to take, it is the duty of the railroad company to inform him and put him off at a proper place. If in such a case the conductor negligently and wantonly ejects the passenger at a dangerous place, and the passenger in consequence suffers injuries, the railroad company is liable for exemplary damages.

On November 25, 1883, the plaintiff purchased a ticket at defendant's station in Erie, good only for thirty days, for one continuous passage each way, from Erie to Cleveland and return. The next morning between one and two o'clock when he was about to take the limited express train to return to Erie, an employee of the defendant directed him to the day coach; he stepped in, sat down, and quickly curled up and went to sleep. After the train had started he was awakened by the conductor's call for tickets, and instantly took from his pocket the ticket and a roll of money. The conductor reached for the ticket, immediately said, "My orders are to put you off," grabbed the bell-cord, pushed the ticket back, and said, "Your ticket is no good." Then the plaintiff vainly endeavored to show the conductor that he was mistaken, offered money in payment of the fare, which was refused, and begged not to be put off at that place, but to be carried to the

¹ Pennsylvania R. R. Co. v. Vandiver, 42 Pa. 365 (1862).

next station ; the conductor answered, " My orders are to put you off, and off you must get. I obey orders if I break owners, come." Thereupon the plaintiff followed the conductor out of the car, and on reaching the ground, the conductor pointed to a light and said, " That will take you to the depot." The plaintiff started toward that light, soon saw that it was on a locomotive, which ran by him. He then tried to get off the tracks ; came against what he supposed was a freight train, which he believed was just in motion ; turned to pass round the train, and in doing so passed another train back of it ; then believed it was safe to go northward, and as he started he noticed a light to his left, a train of cars backing up, and a single car moving ; about same time another engine passed him ; and when he had crossed some tracks he was struck in the rear and fell unconscious. The condition on the face of the ticket that it was good only for thirty days, was the only one of which the plaintiff had knowledge. He believed it was good on every train, and used that kind of ticket on defendant's road for five or six years, never knew there was any discrimination in its use between trains, and had traveled on the limited express from Cleveland to Erie on such ticket, in March or April preceding the date of the injury. When he purchased this ticket and attempted to use it, he did not know there was any difference as to right to use it, between the limited express and other trains. Neither ticket agent or anybody else informed him that it was not good on the limited express. A verdict and judgment for \$48,750 was sustained.¹

On the morning of April 6, 1883, the plaintiff went to the Broad Street station, at Philadelphia, of the Pennsylvania Railroad Co. to buy a ticket for Lancaster. He

¹ Lake Shore & Michigan Southern Ry. v. Rosenzweig, 113 Pa. 519 (1886).

bought an excursion ticket, the return coupon of which was as follows :

PENNSYLVANIA RAILROAD CO.—DAILY EXCURSION TICKET.

In consequence of the reduced rate at which this ticket is sold, it will only be received for return passage on the day of sale, as stamped on the back. If issued on Saturday or Sunday, will be good to return until the following Monday, inclusive.

LANCASTER TO PHILADELPHIA.

Not good to stop off (on the side).

Return Coupon.

(Indorsed)

J. R. WOOD,

General Passenger Agent.

482.

Pennsylvania Railroad Co., April 6, 1883.
Broad Street, Philadelphia, Pa.

He went to Lancaster, transacted his business, and arrived at the depot at Lancaster at about 11 o'clock in the evening, ready to return to Philadelphia. He waited for a train until about 12.45, when a train arrived, which he took. He took his seat in one of the passenger cars. A short time after the train had left Lancaster the conductor entered the car for the purpose of collecting the fares of the passengers. The plaintiff handed him the return coupon. The conductor examined it and refused to take it, saying that it had expired at 12 o'clock (about an hour before), and said that he would have to pay the full cash fare. The conductor then left and proceeded to collect the fares of the other passengers. He returned and again asked plaintiff for his fare, and said that unless he paid it he would put him off. The plaintiff replied that his ticket was good, but rather than be put off he would pay the difference between the redemption value of his return coupon and a full fare. This offer the conductor refused. In the meantime the train had made several stops at its regular stations, and no effort was made by the conductor to eject the plaintiff. When the train reached a way station called Læmon

Place, the conductor stopped the train and told the plaintiff that he would now have to get off. The plaintiff arose and, under protest, followed the conductor to the door. On reaching the platform of the car, the conductor showed plaintiff off on the side of the train nearest to the station and motioned with his hand toward the station. In order for him to get there it was necessary for him to cross the tracks of the west-bound trains. He had hardly stepped on the ground when the train moved off. It was about half-past one o'clock at night and very dark. There were no lights or signals at the station, and before the plaintiff had time to clear the track the headlight of the express train, which was then due at that place, suddenly flashed upon him, and the next instant he was thrown a considerable distance on one side of the track. He lay for a time unconscious, then sought a place of shelter for the night. The only place he could find was in the signal tower of the railroad company, where he spent the night on the floor. In the morning he returned to Philadelphia. It was held, reversing the court below, that the case should have gone to the jury.¹

Measure of Damages.

265. The measure of damages in an action against a railroad company for ejecting a passenger is not confined merely to compensation for loss of time, expenses incurred, and the cost of another ticket, but the jury may say what is a fair compensation for injuries to his health and business suffered by plaintiff from being ejected from the train.²

A passenger who has been unlawfully ejected from a car is entitled to recover damages for the injury to his feelings and the humiliation inflicted upon him by the

¹ *Arnold v. Pennsylvania R. R.*, 115 Pa. 135 (1886).

² *Pennsylvania R. R. v. Spicker*, 105 Pa. 142 (1884).

trespass. In a case where there was no physical injury inflicted by the ejection a verdict for \$200 was sustained.¹

Regulations as to Colored Persons.

266. It is not an unreasonable regulation of a railroad company to require colored persons to sit in a particular part of a car, if the seats in the part designated are in all respects as comfortable, safe, and convenient as in other parts of the car. "The right of the carrier to separate his passengers is founded upon two grounds—his right of private property in the means of conveyance, and the public interest. The private means he uses belong wholly to himself, and imply the right of control for the protection of his own interest as well as the performance of his public duty. He may use his property therefor in a reasonable manner. It is not an unreasonable regulation to seat passengers so as to preserve order and decorum, and to prevent contacts and collisions arising from natural or well-known customary repugnancies, which are likely to breed disturbances by a promiscuous sitting. This is a proper use of the right of private property because it tends to protect the interest of the carriers as well as the interests of those he carries. If the ground of regulation be reasonable, courts of justice cannot interfere with his right of property. The right of the passenger is only that of being carried safely, and with a due regard to his personal comfort and convenience, which are promoted by a sound and well-regulated separation of passengers. An analogy and an illustration are found in the case of an innkeeper, who, if he have room, is bound to entertain proper guests, and so a carrier is bound to receive passengers. But a guest in an inn cannot select his room or his bed at pleasure, nor can a voyager take possession of a cabin or berth at will, or

¹ *Perry v. Pittsburgh Union Pass. Ry.*, 153 Pa. 236 (1893).

refuse to obey the reasonable orders of the captain of a vessel. But on the other hand, who would maintain that it is a reasonable regulation, either of an inn or a vessel, to compel the passengers, black and white, to room and bed together? If a right of private property confers no right of control, who shall decide a contest between passengers for seats or berths? Courts of justice may interpose to compel those who perform a business concerning the public, by the use of private means, to fulfill their duty to the public—but not a whit beyond.

“The public also has an interest in the proper regulation of public conveyances for the preservation of the public peace. A railroad company has the right and is bound to make reasonable regulations to preserve order in their cars. It is the duty of the conductor to repress tumults as far as he reasonably can, and he may, on extraordinary occasions, stop his train and eject the unruly and tumultuous. But he has not the authority of a peace officer to arrest and detain offenders. He cannot interfere in the quarrels of others at will merely. In order to preserve and enforce his authority as a servant of the company it must have a power to establish proper regulations for the carriage of passengers by regulations for the carriage of passengers. It is much easier to prevent difficulties among passengers by regulations for their proper separation, than it is to quell them. The danger to the peace engendered by the feeling of aversion between individuals of the different races cannot be denied. It is the fact with which the company must deal. If a negro takes his seat beside a white man or his wife or daughter, the law cannot repress the anger, or conquer the aversion which some will feel. However unwise it may be to indulge the feeling, human infirmity is not always proof against it. It is much wiser to avert the consequences of

this repulsion of race by separation than to punish, afterward, the breach of the peace it may have caused."¹

Plaintiff and his wife who were colored people, after purchasing tickets at Wilkes-Barre, boarded the train at this station with the purpose of going to their home at Parsons, a few miles distant. The train had a smoking and two other passenger cars, and plaintiff and his wife attempted to enter the rear car by way of its front platform. Other passengers were entering this car at the same time. Two white women immediately in front entered the car when plaintiff's wife approached and was stopped by the brakeman, who pushed her back and pointed to the front car. She then stepped on the platform of the car in front and endeavored thereby to step on to that of the rear car, but the brakeman put up the chain and prevented her. Plaintiff then tried to take the chain down when the brakeman locked the door. While this controversy was going on, two white women, one of whom was a passenger for Parsons, were permitted to enter the rear car. Not succeeding in her effort to get into the rear car, the train having meantime started, plaintiff's wife entered the one in front and remained there until she reached Parsons. The car in the rear was designated the New York car and that in front the Philadelphia car, they having come from those cities respectively. They were both, however, destined for a point beyond Parsons. The brakeman did not assign plaintiff's wife's color as a reason for her exclusion from the car. It was alleged, however, that plaintiff was smoking, and for that reason alone he was directed to the smoking-car. Three employees of the road swore positively that this was the only subject of controversy, and that plaintiff's wife was not refused an entrance. Witnesses on

¹ West Chester & Philadelphia R. R. Co. v Miles, 55 Pa. 209 (1867).

the part of plaintiff, on the contrary, denied that he was smoking. The court charged that it was conceded on all sides that the wife was excluded; and further instructed the jury that there was no doubt that she was excluded if the testimony was true. It was held that this instruction did not take the facts from the consideration of the jury and that it left to them to determine whether the exclusion was on account of race or color.¹

The penalty prescribed by the Act of March 22, 1867, for excluding colored persons from railroad cars is given by way of punishment to the offender rather than as compensation to the injured person. If, therefore, several persons are excluded, a recovery by one is a bar to recovery by the rest. Thus, where a husband and wife are excluded from a passenger car, and the wife recovers in an action brought by her husband in right of the wife, the husband cannot subsequently recover in his own right.²

Free Passes.

267. A person riding upon a free pass may recover damages for injuries sustained through the negligence of the railroad company, although the pass provides that the person accepting it "assumes all risk of accident to his person or property without claims for damages on this corporation."³

A stockholder of a railroad company was driving, by invitation of the president, in a small locomotive car used for the convenience of the company, and without paying fare for his transportation. A collision occurred

¹Central R. R. of New Jersey v. Green, 86 Pa. 421 (1878).

²Central R. R. of New Jersey v. Green, 86 Pa. 427 (1878); Derry v. Lowry, 6 Phila. 30 (1865).

³Buffalo, Pittsburgh & Western Railroad Co. v. O'Hara, 3 Pennypacker, 190 (1882).

with another engine belonging to the same company, through the gross carelessness of one of the company's employees, and the stockholder received serious injury. It was held that he was entitled to recover damages from the company.¹

Plaintiff, who resided in Philadelphia, was riding on a free pass on defendant's railroad in New Jersey. The pass stipulated that the person using it assumed all risk of accident. Plaintiff proved that the pass had been issued to him as part consideration for the leasing to his employer of a pleasure resort owned by the railroad company. The injury was caused by the company's negligence. The court below charged that if the pass was not a mere gratuity, but was based upon a good consideration, plaintiff was entitled to recover even under the law of New Jersey. On appeal, the judgment was affirmed by a divided court.²

The fact that a free pass given by a railroad company is illegal under the Constitution does not make the person using the pass a trespasser, or prevent him from recovering for injuries caused by the negligence of the company.³

The fact that a person accepted and rode upon a free pass of the description given to employees, and was not such an employee, will not estop him from recovering for injuries caused by the company's negligence.⁴

Where the plaintiff in an accident case was riding on an employee's pass, which stated that he was an employee of

¹ Philadelphia & Reading R. R. v. Derby, 1 Am. Law Reg. (O. S.) 397 (1852), (U. S. S. C.).

² Camden & Atlantic R. R. v. Bausch, 7 Atl. Rep. 731 (1887).

³ Buffalo, Pittsburgh & Western Railroad Co. v. O'Hara, 3 Pennypacker, 190 (1882).

⁴ Buffalo, Pittsburgh & Western Railroad Co. v. O'Hara, 3 Pennypacker, 190 (1882).

the railroad company, the pass should be admitted in evidence, although the effect of it may be rebutted by showing that the plaintiff was really a postal agent of the government, and not an employee of the railroad company.¹

Drovers' Passes.

268. A drover traveling on a free pass in a train on which his live stock is being transported is a paying passenger, and an agreement to release the company from liability for its own negligence indorsed on the pass, is not valid.²

A drover who had shipped live stock received from the railroad company a ticket to "pass the bearer in charge of his stock." On the back of the ticket was this indorsement: "The person accepting this free ticket assumes all risks of accidents, and expressly agrees that the company shall not be liable, under any circumstances, whether by the negligence of their agents or otherwise, for any injury to the person, or for any loss or injury to the personal property of the person using this ticket." The court held that the drover was a paying passenger, and that the indorsement on the back of the ticket did not relieve the company from liability for its own negligence.³

A drover accompanying cattle and riding on a free pass was injured while standing in the rear end of a caboose car. The car was divided into two portions by a partition. The front end was fitted up with a stove and seats. The rear end was used for freight. The plaintiff testified that when the train stopped at a station he went

¹ *Pennsylvania R. R. v. Books* 57 Pa. 339 (1868).

² *Pennsylvania R. R. Co. v. Henderson*, 51 Pa. 315 (1865).

³ *Pennsylvania R. R. Co. v. Henderson*, 51 Pa. 315 (1865).

into the rear end to look after his stock. The conductor saw him standing near the door, but did not warn him that the place was one of danger. The court held that the question of plaintiff's contributory negligence was for the jury.¹

Agreement to Give Pass to Land-Owner.

269. A railroad company is liable in damages for refusing to fulfill an agreement to furnish a pass to a land-owner and his family where such agreement was in consideration of a release of a right of way. Where such agreement was made, the pass was given for awhile and then refused, and an action was then brought to recover damages for the breach of a contract. The court said: "The contract was not simply for a right to ride free upon the railroad. Possibly if in those terms the plaintiff might recover damages for each refusal, or combine his claims for damages for each refusal in a single action to cover any period, as a quarter or a year. But the contract being for a pass, or in other words a free ticket, this document was the principal feature in the bargain. It is obvious that a mere contract to ride free of charge would subject both parties to inconveniences. The company of necessity must operate its road by agents, viz., conductors of trains, and would be liable to suits through the mistakes or ignorance of their servants. So, too, the plaintiff without the evidence of his right would be liable to be refused often when his business might be most urgent. But a pass or a free ticket might relieve both parties from difficulty. The pass being the principal feature of the contract was therefore made its chief subject, for it was the document to be furnished as the evidence of the plaintiff's right. Hence we see no other rule to be

¹ Hanover Junc., etc., R.R. v. Anthony, 3 Walker, 210 (1883).

applied to the case, but damages for the refusal of the pass, as the only cause of action, and this being single to be compensated by such damages, as a pass for life for himself and family would be worth. It is true it is difficult to estimate its value because of two uncertainties—one the length of life, and the other, the number of passages he and his family would probably demand. Still this uncertainty, like many others, must be made to approximate certainty as closely as the nature of the case will admit of. The burden of proof lay on the plaintiff, who knew the number of his family, and the customary number of trips made by himself and them.”¹

A railroad company which has leased all its property and franchises to another company “free and clear from debts, dues, claims, and liabilities incurred or owing” by the lessor, cannot require the lessee company to issue free passes for life to land-owners who had given release of right of way to the lessor in consideration of such passes.²

¹ *Erie & Pittsburgh R. R. v. Douthet*, 88 Pa. 243 (1878).

² *Pennsylvania Company v. Erie & Pittsburgh R. R.*, 108 Pa. 621 (1865).

CHAPTER XX.

CARRIERS OF GOODS.

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Limitation of Liability—General Principles.

270. Carriers may limit by special contracts their liability for the loss of goods intrusted to them, not resulting from their own negligence. BELL, J., said: "It has been a subject of frequently expressed regret by many of our judges, that a common carrier was ever permitted to limit the responsibility which, as a general rule, binds him for the absolute safety of the goods committed to him. The expediency of recognizing in him the right to do so by a general notice, such as was given here, has

been strongly and justly questioned, and, in some of our sister States, altogether denied. Were the question an open one in Pennsylvania, I should, for one, unhesitatingly follow them in repudiating a principle which places the bailor absolutely at the mercy of the carrier, whom, in a vast majority of instances, he cannot but choose to employ. The reasons which would govern me are nowhere better expressed than by Chief Justice GIBSON, in *Atwood v. Reliance Transportation Co.*, 9 W. 87. Yet he concludes by conceding that it is perhaps too late to say that a carrier may not accept his charge on special terms. Since then it has been expressly decided in *Bingham v. Rogers*, 6 W. & S. 495, that a common carrier may limit his liability by notice to passengers, such as was given in this case, that the baggage is at their own risk. This must now be taken as the law of this State, and the court below asserted nothing beyond it.”¹

In *Camden & Amboy R. R. v. Baldauf*,² a ticket contained the following notice: “All baggage at the risk of the owner thereof. The proprietors binding themselves to no charge or care of the same whatever, either express or implied.” The court refused to sustain the notice. ROGERS, J, said: “The company not only declares that the baggage is to be a risk of the passenger, but they attempt to discharge themselves from all charge or care of it whatever. The proprietors say that they bind themselves to no charge or care of the same whatever, either express or implied. There is a plain endeavor to shirk all responsibility whatever, even to the misconduct of their own

¹ *Laing v. Colder*, 8 Pa. 479 (1848). See, also, *Lucesco Oil Co. v. Pennsylvania R. R.*, 2 Pittsburgh Rep. 477 (1863); *Buffalo, Pittsburgh & Western R. R. v. O'Hara*, 3 Pennypacker, 190 (1882); *Pennsylvania R. R. v. Butler*, 57 Pa. 335 (1868); *Wolf v. Western Union Telegraph Co.*, 62 Pa. 83 (1869); *Empire Transportation Co. v. Wamsutta Oil Co.*, 63 Pa. 14 (1869).

² 16 Pa. 67 (1851).

agents, and to avoid the duty which the law casts upon them, to provide places for the safe custody of the goods, and persons whose business it is to take charge of such articles as are committed to their care. They undertake to carry for hire, and, by the very nature of their employment, to bestow, for the preservation of the goods, at least the ordinary care of a bailee for hire. From this duty I have no hesitation in saying they cannot discharge themselves, even by a special agreement with the owner. Such a stipulation would be void, being against the policy of the law. There is no principle in the law better settled than that whatever has an obvious tendency to encourage guilty negligence, fraud, or crime is contrary to public policy. Such, in the very nature of things, would be the consequence of allowing the common carrier to throw off the obligation, which the law imposes upon him, of taking at least ordinary care of the baggage or other goods of a passenger. Under such a regulation no man's property would be safe: *Cole v. Goodwin*, 19 Wend. 251."

An owner of a freight car was permitted by the agents of a railroad company to attach his car to a passenger train contrary to the instructions and rules of the company. The owner of the car agreed "to run all risks." The court held that the company could not repudiate the acts of its agent so as to free itself from liability for loss occurring through negligence.¹

A bill of lading provided that the "carrier shall not be liable for loss or damage by causes beyond its reasonable control, by riots or any other reason not directly traceable to the negligence of the carrier's servants." The goods were stolen in open daylight in the presence of the company's trainmen, who made no offer to resist the thieves

¹ *Lackawanna & Bloomsburg R. R. v. Chenewith*, 52 Pa. 382 (1866).

and protect the goods. It was held that the company was liable.¹

Notice to Shipper.

271. A carrier may by special contract relieve himself from liability, except for his own negligence, but he must show clearly that the person with whom he deals is fully informed of the terms and effect of the special contract. Thus, if a carrier takes the trunk of a German who does not understand English, a notice of limitation of liability in the English language is insufficient. In *Camden & Amboy R. R. v. Baldauf*,² ROGERS, J., said: "The facts found by the jury negative the idea of such a notice as amounts to a special contract. The plaintiff was a German wholly ignorant of the English language. It is, therefore, a case of a passenger uninformed of the terms and conditions of the notice appended to the ticket, on which the defendants rely for protection. The case of *Davis v. Willan*, 2 Stark. R. 279, rules that a notice at the office, when the party who delivers the goods cannot read, does not change the liability of the carrier. That case is, in principle, identical with this. It, in truth, would be absurd to hold, under the circumstances, the company exempted from their common-law responsibilities on the foot of a special or express contract, when he was ignorant of the terms of the proposed agreement. Granting the tickets in any case, without more, may be considered as evidence of a special agreement, it is surely not exacting too much to require the carrier to have his tickets printed and his advertisement made in a language which the passengers can understand, or that he should be required to explain to him the nature and effect of the

¹ *Lang v. Pennsylvania R. R.*, 154 Pa. 342 (1893).

² 16 Pa. 67 (1851).

proposed agreement. Although it may be granted that in this State a carrier may limit his responsibility, yet this principle has been reluctantly recognized, and must be confined to cases of special contract, express or at least implied. The knowledge of the plaintiff of the contents of the notice is negatived by the verdict. It is substantially found the plaintiff had no notice that his goods were carried at his own risk. In the absence of all proof of notice the plaintiff had a right to rely on the common-law responsibility of the carrier."

Burden of Proof.

272. A carrier of goods may limit his liability except as against his own negligence, and in that event the liability depends upon the proof of negligence in fact. If no explanation whatever is given as to how the injury occurred a presumption of negligence arises which is sufficient to justify a recovery in cases where there is no other proof than of the delivery of the goods to the carrier in good condition, and their arrival at the point of destination in a damaged condition. Such were the cases of the *American Express Co. v. Sands*,¹ and *Grogan & Merz v. Adams Express Co.*² On the other hand, where there is proof of the fact of the injury and the manner of its occurrence in circumstances which did not import negligence of the defendant, there is no liability of the carrier whose contract was for a limited liability only, except upon proof of negligence as an inducing cause of the injury and the burden of making such proof is upon the plaintiff. Such were the cases of *Farnham v. Camden & Amboy R. R.*,³ and *Patterson v. Clyde*.⁴

¹ 55 Pa. 140.

² 114 Pa. 523.

³ 55 Pa. 53.

⁴ 67 Pa. 500.

Stoves were delivered to a carrier. The evidence showed shipment in good order, and delivery in bad order, and that the goods were carelessly packed, and there was no collision or wreck in the course of transportation. The bill of lading limited the liability of the carrier except as against his own negligence. The court while submitting the case to the jury charged that the carrier must show how the accident occurred, otherwise the legal presumption arose that the carrier was guilty of negligence. It was held that this was error, as the effect of the instruction was to lead the jury to believe that they must find for plaintiff unless the defendant had shown distinctly the actual facts and circumstances of the accident to the stoves. The absence of such distinct proof did not deprive the defendant of the right to have the question of negligence considered upon all the testimony.¹

Plaintiff shipped over defendant's railroad, four glass-house pots. The bill of lading contained this clause: "Neither this company, nor any other such company, shall be liable for any loss or damage to such property by dangers of accident to railroad transportation, or by fires or floods, while at depot stations, yards, landings, warehouse, or in transit, and said property is to be carried at the owner's risk of leakage, breakage, chafing."

To cover shipments during the year 1888, the plaintiff company had executed and delivered to the defendant company a paper dated January 10, 1888, containing the following provision:

"In consideration of the Pittsburgh & Lake Erie Railroad Company transporting my property, as described, at a reduced rate, all glass-house pots, etc., shipped by us during the year 1888, from Pittsburgh station to various stations, the same being consigned to various parties, at various

¹ Buck v. Pennsylvania R. R., 150 Pa. 170 (1892).

points, I hereby release said company, and each and every other company over whose lines said goods may pass to their destination, from any and all damage that may occur to said goods, arising from leakage or decay, chafing or breakage, damage by fire while in transit or at stations, loss or damage from the effects of heat or cold, from delay at points of transfer or transshipment, or from any cause not the result of collision of trains, or of cars being thrown off the track while in transit."

It was shown that plaintiff's glass-pots, packed like those in this case, had uniformly reached their destination in good condition; that when these pots arrived at Phillipsburg, they were found to be displaced in the car, and that on further inspection, they were condemned as broken and unfit for use. The conductor of the train testified that there had been no collision or derailment on the way. It was held that the case was for the jury. STERRETT, J., said: "The case was clearly a proper one for the consideration of the jury on all the evidence before them. Considering the damaged condition of the pots, at the place of delivery, in connection with the evidence as to their soundness when shipped, and the careful manner in which they were packed in the car, and the further fact that similar pots, packed in like manner, had uniformly reached their destination in good condition, it cannot be successfully contended that, under all the evidence, the jury were not warranted in finding that the destruction of the pots was the result of actual negligence on the part of the carrier. If they believed, as they might well do, from the evidence before them, that the pots were so carefully and securely packed in the car that nothing short of positive carelessness, in course of transportation, could have injured them, it was their duty to find as they did.

"There is no analogy between the death of a horse or other animal in transitu, without any visible cause, and the injury or destruction of inanimate property, such as the clay pots in this case. In the absence of proof to the contrary, the fair inference is that the death of the former is due to natural causes; but not so in the latter case. If the pots were carefully and securely packed, when delivered to the carrier, and, when they reached their destination, were found in the badly damaged condition described by the witness, the only reasonable inference was that they were not transported with ordinary care. These questions of fact and inferences were for the jury, and it would have been error to have withdrawn them from their consideration."¹

Barrels of syrup were shipped from Buffalo to Philadelphia under a bill of lading which made the owner liable for leakage. By the bill of lading the defendant company undertook merely to transport the syrup to Canandaigua and there deliver it to the Pennsylvania R. R. Company. All losses were at owner's risk. When the syrup reached Philadelphia it was found that considerable leakage had taken place. It was not shown in what condition the barrels reached Canandaigua, but the defendant showed that no accident had happened to the train before its arrival at that point. It was held that there was sufficient evidence of negligence to send the case to the jury.²

A car containing oil was thrown from a track through the breaking of an axle. It was left lying where it was thrown from the track, and two men who came along, out of curiosity, drew a match across the car to test whether the freight was oil or whisky. The oil ignited and an

¹ *Phoenix Pot Works v. Pittsburgh & Lake Erie R. R.*, 139 Pa. 234 (1891).

² *New York Central & Hudson River R. R. v. Eby*, 22 W. N. C. 92 (1888).

explosion occurred by which the oil was destroyed. It was held that if the jury should find that the company had exercised reasonable care not only in preventing the accident, but in preserving the oil, plaintiff was not entitled to recover.¹

Conflict of Laws.

273. A contract made in another State by which the shipper voluntarily releases the carrier from responsibility for negligence will be enforced in this State if it appears that such a contract is valid in the State where it was made.

An owner of a circus train entered into a contract in New York by which, in consideration of the transportation of the train over a railroad in that State, he voluntarily agreed to release the railroad company from responsibility for negligence. By an accident in New York, caused by the negligence of the railroad company, the train was seriously injured. The contract was valid under the New York decision. The court held that it should be enforced in this State, as it was not contrary to justice or morality, and its enforcement would not derogate from the laws or settled public policy of Pennsylvania.²

Delivery—Notice to Consignee.

274. If, for any reason, a carrier does not deliver freight to the consignee or his agent personally, he must give notice to the consignee of its arrival, and keep the same in safety, upon his responsibility as a carrier, until the consignee has had a reasonable time to remove it.³

¹ *Lucesco Oil Co. v. Pennsylvania R. R.*, 2 Pittsburgh Rep. 477 (1863).

² *Forepaugh v. Delaware, Lackawanna & Western R. R.*, 128 Pa. 217 (1889).

³ *Tanner v. Oil Creek R. R. Co.*, 53 Pa. 411 (1866).

Goods were sent by plaintiffs from Connautville, directed to Benjamin McMahon, at Millerstown. They were delivered to the express agent on Thursday in time to have reached their destination on the evening of that day if sent by direct route. It appears they were sent by a more circuitous route, which the company was then using, and they did not arrive at Millerstown until from five to six o'clock of Saturday evening. In anticipation of an earlier arrival, McMahon called at the express office about two o'clock on Saturday afternoon and inquired of the express agent if there was any package for him. The latter replied that there was not. McMahon lived about one hundred rods from the express office, and had lived at the same place for more than a year. He was well known in the town. The goods arrived at Millerstown about six o'clock on Saturday evening, but they were never delivered to McMahon nor any notice of their arrival given to him. The company retained them until Tuesday night, at which time they were destroyed by fire. It was held that the company was liable for the loss.¹

The freight or station agents of a railroad company may bind the company by promises made in the course of the business intrusted to their particular care. Thus where a freight agent promises the consignee, who has twice inquired as to the arrival of goods, that he will give him notice when they come, the company is bound by the promise and must give the notice.²

Duty to Store.

275. Where goods have reached their destination, and the shipper has given no directions as to their delivery, and in accordance with usage they are stored on arrival

¹ *Union Express Company v. Ohleman*, 92 Pa. 323 (1879).

² *Tanner v. Oil Creek R. R. Co.*, 53 Pa. 411 (1866).

in the carrier's warehouse to await the owner's convenience, the liability of the railroad company ceases, and it is responsible only as a warehouseman for negligence in preserving the goods. If the goods are destroyed by fire while in the warehouse, without fault on the part of the company, the owner cannot recover their value from the railroad company.¹

A boiler and engine were shipped upon defendant's railroad, and duly arrived at the station where it was delivered, where it remained unloaded in a car for about a month. It was then taken by a lateral railway to a private platform situated on the bank of a river, about half a mile from the station, which was used by the company for storage, under an arrangement with its owner. There the machinery was unloaded and stored to await the action of the consignees. Ten days after being thus placed, the platform, and with it the machinery, was swept away by an unusually heavy flood, and the machinery was lost in the river. The evidence was conflicting as to whether the consignees had called for the goods during the month. It was held that this was a case of non-delivery at the appointed point of destination, and that the company was liable for the loss.²

The common-law liability of a common carrier may be modified by usage or custom. Thus, a long-continued custom on the part of a railroad company to deliver freight on the platform of a minor station, where there is no warehouse, to be received there by the consignee when discharged from the car, will relieve the company from liability for loss of goods delivered on the platform in the absence of the consignee.³

¹ *McCarty v. New York & Erie R. R. Co.*, 30 Pa. 247 (1858). See, also, *American Union Express Co. v. Robinson*, 72 Pa. 274.

² *Pennsylvania R. R. v. Mitchell*, 4 W. N. C. 3 (1876).

³ *McMasters v. Pennsylvania R. R.*, 69 Pa. 374 (1871).

Delivery by Express Companies.

276. Express companies are common carriers, and are generally held to personal delivery either at the residence or place of business of the consignee. They must carry goods to their destination within a reasonable time, and deliver them as soon as practicable within business hours.¹

Delivery to Wrong Person, or in Violation of Instructions.

277. A common carrier is bound to deliver the goods to the consignee, and if he makes a mistake and delivers them to the wrong person, he is liable to the consignor for their value in case of loss.

Plaintiffs' salesmen took an order for goods from L. Behrend, and transmitted the order to plaintiffs. Plaintiffs supposed that the goods were for A. Behrend, a previous customer in good standing. They accordingly delivered the goods to the defendant, a railroad company, having marked the box containing them "A. Behrend." When the goods arrived at their destination, L. Behrend claimed them and the railroad company delivered them to him. L. Behrend did not pay for them, and subsequently failed, causing entire loss to plaintiffs. It was held that the railroad company was liable.²

A box belonging to Leopold Hodapp was improperly directed "Leopold Hotelfa." The box was carried to its destination, and kept securely for two months, diligent inquiry being made in the meantime for the consignee. It was finally delivered to a person named Chistian Leopold, who kept "Leopold's Hotel." In an action against the railroad company by the true owner, it was held that the railroad company was not liable for the loss.³

¹ Union Express Co. v. Ohleman, 92 Pa. 323 (1879); American Union Express Co. v. Robinson, 72 Pa. 274 (1872).

² Wernwag v. Philadelphia, Wilmington & Baltimore R. R., 117 Pa. 46 (1887).

³ Lake Shore & Michigan Southern Ry. Co. v. Hodapp, 83 Pa. 22 (1877).

Where a box improperly directed was carried by a railroad company to its destination, and thereafter having been kept safely for two months, and diligent but fruitless inquiry made for consignee, it was delivered by reason of the improper direction to the wrong person, the company was not liable for the loss.¹

A railroad company received goods for transportation accompanied by a manifest containing instructions as follows: "Order Wright, Dunton & Co., notify Wellington Jones, Shamokin, Pa." At Sunbury the car was delivered by the freight agent of the Empire Transportation Company to the defendants, for transportation to Shamokin. At the time of this delivery, the agent of the Empire Transportation Co. transferred to the agent of the defendants, the original manifest containing the directions above mentioned. The defendants in making up their own manifest, omitted from it the words, "Order Wright, Dunton & Co.," and placed upon it the name of Wellington Jones, as consignee, omitting also the explanatory word "notify," which, in the manifest of the Empire Transportation Co., preceded the name of Wellington Jones. The plaintiffs had drawn on Jones for the price of the corn, having attached the bill of lading duly indorsed by them to the draft, gave it to their bank for collection. At Shamokin the defendants delivered the corn to Jones. The draft was returned to the plaintiffs protested, with the bill of lading attached. The result was that the plaintiffs lost the corn. It was held that the company was liable for the loss.²

Plaintiff shipped a car-load of dried bones from Bay City, Michigan, to Landenburg, Chester County, Pa., consigned to themselves. At the same time they drew on

¹ Lake Shore & Michigan Southern Ry. Co. v. Hodapp, 83 Pa. 22 (1877).

² Wright v. Northern Central Ry. Co., 8 Phila. 19 (1871).

Whann for the amount, at forty-five days. There was a bill of lading attached to the draft showing that Stern & Spiegel, the shippers, had consigned said car to themselves. The letter of the latter to Whann, and the invoice, were shown to the agent of the defendant company at Landenberg. The agent delivered the car to Whann without the bill of lading, and without an acceptance of the draft. It was held that the consignors were entitled to recover.¹

The plaintiffs gave evidence that Furniss & Co., of Indianapolis, desired to purchase goods of them upon a credit. Not being satisfied as to their solvency, plaintiffs made an arrangement with Mr. Welsh, agent for the Union Railroad & Transportation Company, before delivering the goods for transportation, by which the boxes should be marked "(F) Indianapolis, Indiana, care of S. F. Gray, Agent," and should not be delivered to Furniss & Co. until further orders from plaintiffs. The boxes thus marked were delivered to the defendants. The plaintiffs claimed this to be the contract under which they delivered, and the defendants received, the goods.

The defendants gave evidence that when the drayman subsequently, upon the same day, delivered the goods to them, he brought and presented for their signature, a shipper's receipt, filled up by plaintiffs' shipping clerk, in which the boxes were described as marked "(F) Indianapolis, Indiana. For J. Furniss & Co., care S. F. Gray, Agent." Upon the face of the receipt it declared they were "to be carried and delivered upon the terms and according to the agreement as specified on the back of this receipt." Upon the back of this receipt, *inter alia*, is printed, "it is agreed and is part of the consideration of this contract:

¹ Pennsylvania R. R. v. Stern, 119 Pa. 24 (1888).

"1. That all goods received for transportation shall be . . . distinctly marked with the name of the consignee, and the station where and to whom consigned."

That the defendants signed said receipt and returned it to the drayman, who took it back to the plaintiffs. This direction, as contained in the receipt, was substantially copied into the manifest which was sent on to Gray. It appeared that upon the arrival of the goods Gray delivered them to Furniss & Co., who soon after failed and the goods were lost to the plaintiffs. It was held that the contract was to be ascertained by the jury from both the receipt and the verbal arrangements.¹

If the carrier delivers the goods otherwise than in accordance with the bill of lading, he is responsible for any loss resulting therefrom. If the carrier attempts to evade this rule by setting up a course of dealing between the parties, the evidence must be sufficient to bring home knowledge to the shipper, in a way that would justify a finding that he acquiesced in the course of dealing, and had consented to the delivery in the particular instance, in accordance therewith.²

If the shipper of goods delivers them to the carrier without any qualification or restriction, he parts with all control of the goods, and he cannot by a subsequent direction, prevent their delivery to the consignee, unless he shows such facts as would justify his stopping them *in transitu*. In such a case if a judgment is rendered against the carrier in favor of the consignor in another State for a misdelivery of the goods, the carrier cannot avail himself of this judgment in a suit against the consignee.³

A consignee who receipts for goods which he claims

¹ Union R. R. & Transportation Co. v. Riegel & Co., 73 Pa. 72 (1873).

² Pennsylvania R. R. v. Stern, 119 Pa. 24 (1888).

³ Philadelphia & Reading R. R. v. Wireman, 88 Pa. 264 (1879).

were not delivered to him must satisfactorily explain how the company came to possess acknowledgment under his hand for goods which had not been delivered.¹

Notice of Claim of Loss.

278. It is a reasonable condition in a bill of lading to require the owner to make a claim in writing as to a loss or injury of the goods within five days after the goods are unloaded. It is proper, because the demand promptly made gives warning and enables the carrier, while evidence is attainable and recollection clear, to institute inquiry into the merits of the claim, and thus guard against fraud or over-valuation. Such a condition will be enforced even if the carrier has violated other clauses of the bill of lading. Thus where a railroad company agreed to transport live stock by passenger service, but, contrary to the agreement, shipped it by freight service, and the stock was injured, it was held that the shipper could not recover damages for the loss because he had failed to give the five days' notice required by the bill of lading. DEAN, J., said: "It is undisputed that the defendant did not carry the horses the whole distance in the mode provided and charged for in the contract; from Buffalo to Philadelphia it carried them by freight instead of passenger train service, which is a manifest deviation; therefore its liability is fixed by the common law; there is no conflict in authority on this point either in this State or elsewhere. There is still a contract by which the liability of defendant is determined, but it is one which the law implies from the relation of the parties, consignor, and common carrier. The implied contract is, that defendant is an insurer of the horses—that is, that it agreed to carry them safely from the point of shipment

¹ Chapman v. Camden & Amboy R. R., 7 Phila. 204 (1870).

to destination unless prevented by 'Act of God or the public enemy.' The carrier by its own act, deviation from the contract made, subjected itself to this increased and stricter liability. All the exceptions by which it is sought, in the 2d, 3d, 4th, 5th, 6th, and 7th provisions, to modify the more stringent implied contract of the common law, are gone, and its liability now is that of an insurer.

"This rule had its foundation in public policy; the reason for it, as announced in the leading case, *Coggs v. Bernard*, 2 Ld. Raym. 909, is, 'Because it is for the safety of all persons, the necessity of whose affairs oblige them to trust to these sorts of persons that they may be safe in their ways of dealing.'

"The end to be obtained is the prevention of fraud on the shipper by the carrier. The shipper intrusts the carrier with his goods to be carried to a distant point; care and oversight on the part of the owner are gone, relinquished wholly to another, who has no interest in them except the comparatively small one of a freight charge. To him there is temptation to fraud, and opportunity to commit it with little chance of detection; therefore, to guard against this, the law holds him to accountability as an insurer and accepts no excuse for non-delivery, either in quantity or value. In the course of time, the strictness of this rule has been greatly modified by notices and special contracts between carriers and shippers which, in so far as they were not unreasonable, or manifestly against public policy, have been approved by the courts and sanctioned by legislation.

"It will be noticed that the reason for the rule grows out of the peculiar relation between the parties from the moment of consignment to that of delivery. During the time the goods are out of the reach of the owner, in the

custody of one not the owner, the custodian assumes a duty ; he owes none to the owner before the consignment, nor after their delivery. While the reason for the rule would sweep away every stipulation of the contract in derogation of the duty imposed on the carrier, certainly it has no application to a provision referring to an act on part of shipper subsequent to delivery. The distinction between a stipulation going to fix the liability of the carrier, and one for his protection against fraud either before acceptance of goods or after delivery, is obvious ; the law fixes the strict accountability of the carrier while he has possession of the goods to prevent him defrauding the shipper ; there is no reason why, under any circumstances, it should declare abrogated antecedent or subsequent stipulations on the part of carrier to prevent shippers from defrauding him.

“Why then extend the rule beyond the point where the reason for it exists? We have held that such limitations as this one are reasonable, because they lessen not the legal liability of the carrier, while they tend to his protection against fraud ; if in so holding under a special contract we close the door against fraud, why should we open it under the implied contract which the law enforces? The shipper here, by reason of the deviation from the contract on part of defendant, has the right to hold it to accountability as an insurer ; the defendant has a right to hold the shipper, this plaintiff, to that reasonable promptness provided in the contract for presentation of his claim.”¹

Non-delivery by Reason of Seizure of Goods by Legal Process.

279. A railroad company as a carrier is released from liability to the owner of the goods taken from it by at-

¹ Pavitt v. Lehigh Valley R. R., 153 Pa. 302 (1893).

tachment, replevin, or other legal process, by the Act of June 13, 1874. On receiving notice of such seizure, it becomes the duty of the owners to appear and defend their title, and they have a right to intervene.¹

Advances were made by the plaintiffs on six bills of lading issued by defendants for grain, hay, etc., shipped on their road. Upon the ground that the purchases by the consignee were fraudulent, the consignors in Mansfield, Pa., under the Act of July 12, 1842, issued attachments under which certain cars were seized. Other cars were seized under attachment and a writ of replevin in Elmira, N. Y. Three cars reached Philadelphia and were delivered to the plaintiffs. The plaintiffs were not named as defendants in any of these proceedings, but were notified by their agents that the goods had been seized. They did not intervene or ask to intervene, but notified the defendant company that the goods were theirs, that they had bought them, and that they held bills of lading. Suit was then brought against the company to recover the value. Upon entering judgment for the defendant, BUTLER, J., said: "It is quite plain on the facts stated that the defendant is not responsible for the plaintiff's loss. The Pennsylvania statute of June 13, 1874, P. L. 285, governs this case. The object of this legislation was to relieve railroad companies and other carriers and bailees from the duty, supposed or actual of defending suits against the property intrusted to their care. The plaintiff received notice of the attachment, and it was his duty to appear and defend if he supposed any good could be accomplished by doing so."²

The shipper of goods notified the carrier to stop the

¹ *Holmes v. Pennsylvania R. R.*, 2 Pa. C. C. R. 345 (1886). See, also *Lemont v. N. Y. L. E. & W. R. R.*, 2 Pa. C. C. R. 347 (1886).

² *Lemont v. New York, Lake Erie & Western R. R.*, 2 Pa. C. C. R. 347 (1886) (U. S. C. C. R. Dist. of Pa.).

goods in transitu, but was informed that the goods had already been attached by creditors of the consignee. The railroad company subsequently offered to deliver the goods if the shipper would give a bond of indemnity. The shipper did not give the bond, and five days afterward the goods were sold under a judgment obtained in the attachment suit. It was held that the railroad company was not liable for the loss.¹

Measure of Damages.

280. Where a railroad company fails to transport lumber intended to be used on a plank road, the measure of damages is the difference between the value of the lumber at the first station and its value at the station to which it is to be carried, deducting cost of transportation; providing, however, that lumber of the kind required could be obtained in sufficient quantities at the latter station, and that the company should make compensation for whatever delay might arise from its failure.²

Limitation of Value.

281. In Pennsylvania a common carrier may, by special contract, limit his liability to a particular amount specified in the bill of lading.

One of the clauses of a bill of lading was as follows: "The responsibility of the company as carriers of the within-named goods is hereby limited so as not to exceed \$100 for every one hundred pounds weight thereof, and at that rate for a greater or less quantity, the shipper declining to pay for any higher risk. The company will insure to any amount if desired." The goods weighed 3,220 pounds and were of the value of \$6,778.24. They

¹ *Baltimore & Ohio R. R. v. Davis*, 20 W. N. C. 514 (1888).

² *Pennsylvania R. R. v. Titusville Plank Road Co.*, 71 Pa. 350 (1872).

were destroyed by an accidental fire while still in the custody of the railroad company, but it did not appear that the fire was caused by the negligence of the company or its employees. The court held that the company was liable for the loss of the goods only to the extent of \$3,220. "As the contract to carry these goods," said THOMPSON, J., "was as bailees for hire and not as common carriers, and as they did carry them, according to their agreement, to the terminus of their line and they were there destroyed by fire, the defendants are not liable, in the absence of proof of negligence, to respond to the plaintiff's claim. The doctrine is firmly settled that a common carrier cannot limit his liability so as to cover his own or his servant's negligence. Nor do I suppose this possible of any bailee; but it is clear that by contract he may be placed in the position of a limited insurer, excepting negligence, instead of an insurer against everything but the act of God and public enemies. If he be compensated only for the former risk instead of the latter, at the choice of the consignor, it would be contrary to common honesty to compel him to make good a risk he was not paid for assuming."¹

Limitation not Effective when Goods are Lost by Negligence.

282. If, however, goods are lost by the negligence of the carrier, the damages are not limited to the valuation in the bill of lading, but the owner is entitled to recover the actual value of the goods.²

¹ *Farnham v. Camden & Amboy R. R. Co.*, 55 Pa. 53 (1867). The limitation of liability to a particular amount applies in favor of a connecting carrier: *Fairchild v. Philadelphia, Wilmington & Baltimore R. R.*, 148 Pa. 527 (1892).

At common law a person who sends goods by a common carrier is not bound to declare their value unless required so to do: *Brown v. Camden & Atlantic R. R. Co.*, 83 Pa. 316 (1877); *Camden & Amboy R. R. Co. v. Baldauf*, 16 Pa. 67 (1851).

An indorsement on a package, by the company's agents, "said to contain \$300," is evidence of value in a suit to recover the loss of the package: *Weil v. Express Co.*, 7 Phila. 88 (1868).

² *Lang v. Pennsylvania R. R.*, 154 Pa. 342 (1893).

If the goods are lost by the negligence of the company, their real value can be collected, although they are valued at a particular sum in the bill of lading, and the company has limited its liability to the amount thus stated.¹

A carrier, by a special agreement, may limit his responsibility to a sum proportioned to his compensation and risk, irrespective of what otherwise might be the loss.²

In *Weiler v. Pennsylvania R. R.*,³ the court said: "In the case of *Elkins v. Transportation Co.*, 81* Pa. 315, no question of negligence, or of the carrier's right to limit his liability for his acts of negligence was raised, discussed, or decided, either in the court below or in this court. The reporter says that the cause of action held out in the declaration was the loss of certain high wines delivered to defendant, but lost by negligence. This is the only reference to the subject of negligence to be found in the entire report of the case. The record shows that the case was not tried upon any theory of negligence, but exclusively upon the terms and interpretation of the contract as contained in the bill of lading. No question was made upon the subject of the right of the carrier to limit his liability for loss occurring by his own negligence, and we are bound to assume that the facts of the case did not give rise to such a question. Nothing was said upon that subject, either in the argument of counsel or in the charge of the court below, or in the opinion of this court. It was for this reason that no reference was made to this case in the opinion of this court in the case of *Grogan v. Express Company*, 114

¹ *Grogan & Merz v. Adams Express Co.*, 114 Pa. 523 (1886); *American Express Co. v. Sands*, 55 Pa. 140 (1867).

² *Elkins v. Empire Transportation Co.*, 32 P. F. Smith, 315 (1876).

³ 134 Pa. 310 (1890).

Pa. 523. The same reason is applicable now. It may be that the accident in the Elkins case was not the result of any negligence of the carrier. Judging from the names of the counsel concerned, it is almost certain that, if the facts had developed a case of negligence, and the question of the right of the carrier to limit his liability for acts of negligence, that question would have been promptly raised, discussed, and decided.

"In the present case the question does not arise under the conditions annexed to the bill of lading. Many enumerated causes of loss are expressly excepted, such as fire, riots, strikes, heating, freezing, leakage, rust, etc., and as to these the right of the company to limit its liability must be affirmed in accordance with numerous decisions of this and other courts. But the final clause of the conditions stipulates that, 'when a valuation as agreed upon shall be named upon this shipping receipt, it is distinctly understood that such valuation shall cover loss or damage from any cause whatever.' As this necessarily includes loss arising from negligence, and as the testimony tended to establish a loss by negligence, the question of the efficacy of the clause under consideration to relieve the company from liability for negligence beyond the agreed value necessarily arises. Upon this subject we have so recently expressed ourselves in the case *Grogan v. Express Co.*, *supra*, that we think it unnecessary to repeat either the substance or text of the opinion there announced."¹

A bill of lading limited the value of a case of wine to an amount under \$20.00. About three-twentieths of the entire quantity of wine were stolen from a car. The value of the three-twentieths stolen was \$31.05. The court held that only the amount limited by the bill of lading could

¹ *Weiler v. Pennsylvania R. R.*, 134 Pa. 310 (1890).

be recovered, and the plaintiff was only entitled to receive three-twentieths of \$20.00, which was \$2.24.¹

A valuation written into the blank of the printed bill of lading is not controlled by a printed stipulation that the amount of the loss or damage accruing and falling on the carriers shall be computed at the value or cost of the goods at the place and time of shipment. The parts written into the printed bill express the true contract of the parties, and must be regarded as the value or cost fixed by the parties in advance.²

A condition in a bill of lading that "when a valuation as agreed upon shall be named upon this shipping receipt, it is distinctly understood that such valuation shall cover loss or damage from any cause whatever," will not relieve a common carrier from liability for the actual value of goods lost in transit through the carrier's negligence.³

Fire—Burden of Proof.

283. A carrier may by special contract relieve himself from liability of loss by fire, if the loss is not occasioned by his own negligence. But where loss by fire is excepted in the bill of lading the burden of proof is upon the shipper if the carrier has proved that the loss resulted from fire unattended by circumstances indicating negligence on his part.⁴

If a carrier which is relieved from liability from loss by fire except for gross negligence refuses to give any information as to how a fire occurred which injured a carriage delivered to it for transportation, a presumption of

¹ *Joly v. Pennsylvania R. R.*, 18 W. N. C. 240 (1886).

² *Elkins v. Empire Transportation Co.*, 32 P. F. Smith, 315 (1876).

³ *Weiler v. Pennsylvania R. R.*, 134 Pa. 310 (1890); *Grogan v. Express Co.*, 114 Pa. 523.

⁴ *Patterson v. Clyde*, 67 Pa. 500 (1871).

negligence arises which the company is bound to rebut; and in such a case evidence that the company exercised ordinary care is not sufficient to repel the presumption of negligence, but the case must be submitted to the jury to determine whether the evidence satisfactorily accounted for the fire.¹

A bill of lading relieved the carrier from liability for loss by fire in transit, except for gross negligence of the company or its servants. Plaintiff's goods were in a car, placed next to the tender of the engine. The car was made of wood, with doors sliding on the outside, leaving an opening or crevice about a quarter of an inch wide between the doors and the side of the car. The doors were locked up and sealed. The car containing the plaintiff's goods had been in use about five years for the transportation of goods by express. It was lined with wood, well finished, and in good order. The messenger in charge of the goods rode in the forward passenger car. The locomotive was a wood-burning engine, and, according to the testimony of the messenger, threw a regular stream of sparks from the time it left the depot. As the train was passing through "Bergen Cut," about two miles from Jersey City, fire was discovered inside the car containing the plaintiff's silks, and before it was extinguished a large quantity of goods, near one of the doors, was either greatly damaged or wholly destroyed. There was no direct evidence that it was unsafe and improper to transport the goods in a wooden car with doors sliding on the outside, or that it was unsafe to use a wood-burning locomotive; nor was there any evidence of want of reasonable and ordinary care in placing the car next to the tender, or in permitting the messenger to ride in the front passenger car. It was held that there was not sufficient

¹ Pennsylvania Railroad Co. v. Miller, 87 Pa. 395 (1878).

evidence of the company's negligence to submit the case to the jury.¹

If the bill of lading excepts "dangers incident to railroad transportation, fire, and all other unavoidable accidents," the company is liable only for want of ordinary skill and care. If the goods are destroyed by fire, the burden of proof is on the company to show that the fire was not caused by the negligence of the company or its servants.²

Fire Caused by Mobs.

284. A bill of lading provided that the carrier shall not be liable "for loss or damages on any article or property whatever by fire or other casualty, while in transit or while in depots or places of transshipment." The cars containing the goods reached the city of Pittsburgh at a time when a mob was in entire possession and control of the railroad company's property. The company called upon the proper authorities of Allegheny County for assistance and protection. Troops were called out which came into conflict with the mob and failed to dispossess them of the company's property. Immediately after the conflict, the cars containing the property of plaintiff's, were destroyed by fire communicated by the mob. It was held that the railroad company was not shown to have been guilty of any negligence, and that the exception in the bill of lading was effective to protect them from liability for the loss.³

On or about July 17, 1877, the defendant received from plaintiffs, at the city of New York, for transportation to Pittsburgh, Penna., goods of the value of \$1,710.

¹ *Adams Express Co. v. Sharpless & Sons*, 77 Pa. 516 (1875.)

² *Colton v. Cleveland & Pittsburgh R. R.*, 67 Pa. 211 (1870).

³ *Hall v. Pennsylvania R. R.*, 14 Phila. 414 (1880).

At the time of receiving the goods the defendant delivered to plaintiffs a bill of lading, where it agreed to transport the goods, subject to several conditions, among which was one that the company should not be responsible for loss or damage by fire, unless it could be shown that such damage or loss occurred through the negligence or default of the agents of the company. On July 17, the car containing the goods was dispatched by defendant from Jersey City for Pittsburgh, reaching Pittsburgh about one o'clock A. M., July 20, at which time a mob took possession of the defendant's property, including the car in question, and held possession until July 22, when troops, ordered by the governor of the State to aid the sheriff in retaking the property, came in conflict with the mob, failed to dispossess the mob, and mob fired the property, and thereby destroyed it. It was held that the company was not liable for the loss.¹

Duty of Carrier as to Combustible Goods.

285. Where combustible goods are on the same train with other merchandise, it is the special duty of the carrier to take every available precaution against the communication or spreading of fire. "An evident and simple measure is, to have the coupling of the cars in such perfect order that any one or more of them can be easily detached from the others, in time to be saved from the consequences. If the fact be that the coupling was defective, unless such defect was the result of an inevitable accident, and, in consequence of it, the car containing the plaintiff's merchandise could not be detached in time to be saved, the negligence and liability of the carrier are inferences of law, from the facts." In such a case the burden of proof

¹ *Westheimer v. Pennsylvania R. R.*, 8 W. N. C. 272 (1880) (U. S. C. C.). See also, *Sherman v. Pennsylvania R. R.*, 8 W. N. C. 269 (1880) (U. S. C. C.).

is upon the carrier to show that the coupling was in good condition.¹

Goods Burnt on Platform.

286. If goods are left on the platform of a station, and are there destroyed by fire, the company is liable as a common carrier, but otherwise if they are burned while in the company's warehouse.²

Act of God.

287. A carrier is not liable for a loss caused by an act of God.

On May 19, 1875, the plaintiff shipped three car-loads of goods from Altoona to Houtzdale. The cars arrived at Osceola, a point on the Tyrone & Clearfield Railroad, at half-past eleven o'clock on the morning of May 20. As the train over the branch to Houtzdale did not leave until the afternoon the cars were run on the siding where it was usual to place the freight for Houtzdale, preparatory to being drawn by another locomotive over the Moshannon Branch Railroad to that point. For several days previous to this a fire had been burning in the woods in the vicinity of Osceola, but it had been so far subdued that no special anxiety was felt by the citizens of the town for its safety. Between twelve o'clock noon and one p. m. of that day a high wind sprung up which increased rapidly to a tornado and drove the fire toward the town. It soon reached the outskirts and spread with such rapidity that all efforts to check it were fruitless. In about two hours the town was practically destroyed, some three hundred houses having been consumed by the flames. The property of the citizens was nearly all burned; very

¹ Empire Transportation Co. v. Wamsutta Oil Co., 63 Pa. 14 (1869).

² Pennsylvania & New York Canal & R. R. v. Waltman, 1 Walker, 139 (1878).

few saved anything, and many had to fly for their lives. The railroad company lost nearly all their property, including the depot and a large number of cars. The three cars of the plaintiff were burned upon the siding where they had been placed. An effort was made by the employees of the company to get these cars out, but it was not successful. The heat and smoke prevented the men from coupling them. The attempt to do so was accompanied with no inconsiderable amount of danger, as the density of the smoke made it difficult to see the locomotive backing in and out. It was held that the high wind which carried the fire to the town was an act of God, and that the railroad company was not liable for the loss.¹

Where baggage is destroyed by a flood of such an unprecedented character as could neither have been anticipated nor provided against, and which amounted to an act of God, a carrier is not liable for the loss. If it is shown that the baggage was lost by the flood of such a character, there is no presumption of negligence which will shift the burden of proof upon the carrier to show that he was not negligent.²

The defendant was sued as a common carrier for its failure to deliver a quantity of whisky shipped over its line of road. The defense set up was that the whisky was lost in the Johnstown flood. The train was overtaken by the flood, but it was not swept away. After the avalanche of water caused by the breaking of the South Fork dam had passed, the train was left upon the track, and the cars were uninjured. The track above and below it was injured so that the train could not resume its journey at once, but remained in the same place until the necessary repairs were made. The whisky claimed for

¹ *Pennsylvania R. R. v. Fries*, 87 Pa. 234 (1878).

² *Long v. Pennsylvania R. R.*, 147 Pa. 343 (1892).

was not destroyed by the flood. Part of it was stolen by thieves after the flood subsided, and the rest of it was destroyed by a volunteer guard of citizens who had watched and protected the train during the night following the flood and part of the next day, as the easiest way of keeping it from falling into the hands of the same dangerous class of men who had gotten a taste of it on the previous afternoon. It was held that the flood was not the cause of the loss, but the occasion of it, and that defendants were liable.¹

Liability for Acts of Shipping Agent.

288. A railroad company is liable for a loss incurred by a person who advanced money on a bill of lading issued by the company's shipping clerk for goods which were not received by the railroad company. "The principal is bound by all the acts of his agent within the scope of the authority which he held him out to the world to possess, notwithstanding the agent acted contrary to instructions, and this is especially the case with officers and agents of corporations. Since a corporation acts only through agents it is bound by its agents' contracts when made ostensibly within the range of their office. One who authorizes another to act for him in a certain class of contracts undertakes for the absence of fraud in the agent acting within the scope of his authority: Whart. Cont., §§ 96, 130, 269. The authority of an agent to act for and bind his principal will be implied from the accustomed performance by the agent of acts of the same general character for the principal with his knowledge and consent: Evans' Agency, 193, note. These elementary principles are founded on the doctrine that where one of two persons must suffer by the act of a third person, he who

¹ Lang v. Penna. R. R., 154 Pa. 342 (1893).

has held that person out as worthy of trust and confidence and as having authority in that matter should be bound by it: *Evans' Agency*, 591. It is conceded in this case that the company did not authorize the issuance of bills of lading without receipt of the goods, but it put Weiss in its place to do that class of acts, and it should be answerable for the manner in which he conducted himself within the range of his agency. Public policy as well as the ultimate good of corporations themselves requires that this should be the rule."¹

The freight or station agents of a railroad company may bind the company by promises made in the course of the business intrusted to their particular care. Thus, where the freight agent promises the consignee, who has twice inquired as to the arrival of goods, that he will give him notice when they come, the company is bound by the promise and must give the notice.²

Lien for Freight—Effect of Surrender of Goods.

289. A railroad company has a right to retain possession of goods until the freight is paid, but if it surrenders them to the consignee, it loses its lien, and cannot recover the goods by an action of replevin.

A lot of stoves were shipped by a railroad company to Erie; the stoves were marked "G. W. Ellsey, Erie, Pennsylvania." The bill of lading which accompanied them in the possession of the company contained the same address, and in addition thereto on the margin the words "Subject to the order of C. B. Belfield." The stoves were delivered to Ellsey who received them in good faith. They were afterward demanded of the rail-

¹ Per STERRETT, J., in *Brooke v. New York, Lake Erie & Western R. R.*, 108 Pa. 529 (1885).

² *Tanner v. Oil Creek R. R. Co.*, 53 Pa. 411 (1866).

road company by Belfield. It was held that the company had lost its lien, and could not recover the stoves from Ellsey by an action replevin.¹

A carrier who has delivered part of the goods given to him for transportation has a lien upon the remainder for the freight due upon the whole consignment.²

Lien on Other Goods by Special Contract.

290. A carrier has a lien upon goods delivered to him for his charges, and by special contract unpaid charges for the transportation of other goods, may also be made a lien upon goods delivered under the contract. But such a contract imposing a lien for unpaid charges due by the consignee cannot be enforced against the consignor after the latter has stopped the goods in transitu.

A clause in a bill of lading provided as follows: "Said merchandise may be retained for all arrearages of freight and charges due thereon and also on any other goods by the same consignee or owner; and such arrearages and the freight and charges on said goods and merchandise shall be a lien thereon until the same shall have been paid." The consignor stopped the goods in transitu. It was held that the carrier's lien extended only to the charges upon the goods stopped. WILLIAMS, J., said: "The goods having been delivered into the possession of the carrier, he may retain them by virtue of his lien for carriage, until his charges and expenses are paid. As between the carrier and the consignee who is owner, we see no reason why this lien may not be extended by a contract to cover a general balance due by the consignor for the carriage of other goods. There would be no injustice or oppression in asking the consignee to pay what he

¹ Lake Shore & Michigan Southern Ry Co. v. Ellsey, 85 Pa. 283 (1877).

² Philadelphia & Reading R. R. v. Dows, 15 Phila. 101 (1882).

honestly owed, before allowing him to remove the goods from the possession of his creditor whether that creditor was a natural or an artificial person.

“But that question is not raised in this case, for the goods never came to the end of the journey where the rights of the consignee and the carrier could be adjusted. The seller intervened and exercised his right of stoppage. This restored the possession to him subject to the charges of the carrier for his services and expenses between the consignment and the stoppage. For these charges, the carrier had a lien that was not divested by the stoppage, and which could be asserted against the seller notwithstanding his exercise of that right: *Hays v. Mouille*, 14 Pa. 48. But as between the carrier and the seller, there was no balance of accounts for carriage of former consignments, for the delivery of the goods to the consignee without payment of the freight was a voluntary surrender of the lien upon them, and the security which the lien afforded. The carrier by such delivery gave credit to the consignee, and undertook to look to his solvency and integrity. The former bills were therefore paid so far as the consignor was concerned, and the carrier had no legal or moral ground for calling upon him to pay any balance due upon them.

“The clause in the bill of lading which has been brought to our attention, and on which the plaintiff in error relies, is not according to its own terms applicable to a case like the present one. That clause provides that the consignee or owner shall pay the freight on the goods consigned to him at the time of their delivery, and that the goods may be retained by the carrier for the charges due thereon, and also for any charges due from him for other goods. As there was no carriage of these goods to the consignee, the special lien provided for could not attach to them.

When the consignor exercised his right of stoppage, the goods were deliverable to him, and the carrier's right of detention depended on the relations thus created. If the consignor was not debtor for previous carriage, and had not contracted that these goods might be retained from him for such debt, then the carrier's lien did not extend beyond the charges applicable to the goods stopped, and on payment or tender of these he was entitled to a delivery of the goods. If the right of the carrier to extend its lien by contract with the owner to the general balance due from such owner be conceded, as it may be, still the lien is confined to the goods of such owner. The goods which by the exercise of the right of stoppage became those of the consignor, cannot be made subject to a lien for the debt of the consignee."¹

A condition in a bill of lading that goods carried should be liable for "arrearages of freight due on other goods of the same consignee or owner" is not unreasonable if the consignee is actually indebted for such arrearage.²

Where goods are delivered to a carrier consigned generally to a purchaser at a particular city without any particular place of delivery being designated, the title of the consignor passes upon delivery of the goods to the carrier, and the carrier cannot by a clause in the bill of lading subject the goods to a lien for prior freights due from the consignor on other consignments of goods, and refuse to deliver until such prior freights are paid.³

Sale of Goods to Enforce Lien.

291. Where a common carrier applies to a judge of the Court of Common Pleas for an order of sale of goods in

¹ *Pennsylvania R. R. v. American Oil Works, Limited*, 126 Pa. 485 (1889).

² *Kirkman v. Philadelphia & Reading R. R.*, 1 Del. Co. R. 165 (1881).

³ *Bacharach & Co. v. Chester Freight Line*, 133 Pa. 414 (1890).

his possession to satisfy his lien under the Act of December 14, 1863, P. L. 1864, p. 1127, and such order is granted, it is his duty to expose the goods for public sale at auction. If he sells trunks or boxes filled with valuable goods, as trunks or boxes the contents of which are unknown, without exhibiting the goods or stating what is in the trunks or boxes, so that the buyers cannot know what they are bidding for or buying, such a sale is contrary to the Act of Assembly and the order made under it and is unlawful, and the carrier will be responsible to the owner for the value of the goods.¹

Connecting Carriers, When Liability of First Carrier is Confined to His Own Line.

292. A common carrier who accepts goods to be carried to a point beyond the terminus of his own line is not liable for a loss occurring through the negligence of the connecting carrier.²

A railroad company receipted for goods "to forward to T. Mullarkey, Tuscaloosa, Ala.," a point beyond its own line. The company proved the delivery of the merchandise, in good order, to the next carrier in the regular course of transportation to Tuscaloosa. It was held that the company had fully performed its duty, and was not liable for the loss occurring on the connecting line.³

In the absence of stipulation by a carrier to transport goods beyond the terminus of his own route, he is not responsible for the default of those whom he employs to carry the remainder of the distance; but if it is to be fairly inferred from the bill of lading that he makes himself responsible for the safe delivery of the goods to their

¹ *Schlessinger v. Adams Express Co.*, 9 Phila. 70 (1872).

² *Jenneson v. Camden & Amboy R. R.*, 5 Clark. 409 (1856).

³ *Mullarkey v. Philadelphia, Wilmington & Baltimore R. R.*, 9 Phila. 114 (1873).

ultimate destination, he is liable for the negligence of a connecting carrier.¹

If a bill of lading provides that each company of a series of connecting carriers shall be responsible to the shipper or owner for the property while in its custody, but not for the default or negligence of any other company, the last company is not responsible for an omission of the preceding company to state that freight was paid, and the last company has the right to retain the goods in its possession for a reasonable time, until it can inquire into and ascertain the facts.²

Liability for Loss on Connecting Carrier's Line.

293. A carrier may bind himself to transport goods beyond the terminus of his own route, and thus become responsible for the default of those he employs to carry the remainder of the distance; but the proof of the contract should be clear. Especially should this be the rule when the alleged contract would contradict the papers accompanying the transaction.

In *Pennsylvania R. R. v. Berry*,³ the plaintiff testified that on April 1, 1868, he made a contract with Gemmil, the agent of the defendants, to transport his goods to Tidioute without change of cars, and selected a car of proper gauge to go on the other road, the goods to be charged more on that account. On April 3, the car was at Irvington; on the 4th, Saturday noon, it was at Tidioute; he paid charges there, but could not unload that day. The clerk and plaintiff looked into the car; all was dry and right. On Monday he again deferred unloading. On Tuesday he unloaded, and worked until

¹ *Clyde v. Hubbard*, 88 Pa. 356 (1879).

² *Union Express Co. v. Shoop*, 85 Pa. 325 (1877).

³ 68 Pa. 272 (1871).

night without taking out all the goods, locked the car and left. On Wednesday he missed the articles mentioned in the list; on that morning nothing appeared to be disturbed. On Saturday he saw the box of books, dining-table, and box of bedding in the car, but did not see the cask of china. He gave other evidence of the loading of goods and their value. Gemmil, the agent of the defendants, testified that the plaintiff wanted a car to go through and not require the goods to be transferred; witness got him one loaded. On cross-examination, he said he gave a receipt to Waid, whom the plaintiff had employed to haul the goods to the car, and took a release from Waid. The defendants had business arrangements with the other company to run to and over their road, and collect track freights; the arrangement was, if there was one car only used, the freighter was to pay car service. The plaintiff wanted a car that would save the transfer of the goods. Witness made no arrangement that the defendants should carry the goods to Tidioute.

The defendants gave in evidence Waid's release to defendants for a "lot of H. H. goods from Warren station to Irvington, consigned to E. H. Berry, Tidioute," and to all other companies over whose line the goods should pass, from damage, from leakage, decay, chafing, breakage, damage by fire or from any other cause not the result of the collision of trains or of the cars being thrown off the track. This contract to be executed by shippers of light furniture, household or miscellaneous goods. The manifest was dated April 3, 1868, viz.:

"Merchandise forwarded from Warren to Irvington."
"Marks, Tidioute, Pa." "Consignee, E. H. Berry." "Description, lot of H. H. goods (released)." "Amount of freight, \$7." "Expenses, \$1." "To be collected, \$8."

The manifest went with the goods and car. The receipt

stated that "as part of the consideration of the contract," the defendant should not be responsible (among other things) for theft nor in any event for more than \$50; when goods are intrusted to any other company, that company shall be regarded exclusively as the agent of the owner and alone liable. The responsibility of the company to commence with the shipment and terminate with unloading the car. The defendant further gave evidence that the car and goods arrived at Irvington between ten and eleven o'clock A. M., of April 3, and the car was transferred to the other road about two P. M. of the same day. Also, that when the plaintiff came to see about the goods, he was told that they would have to be rehandled and transferred unless he was willing to pay car services, and to that he agreed. The court held that the evidence was insufficient to establish a contract of through carriage.

Where a railroad company carries goods to its terminus and delivers them to a connecting carrier, taking a bill of lading and receipt in the name of the company, the contract of carriage between the connecting carrier and the railroad company becomes the contract of the consignee at the ultimate point of destination. The railroad company is the agent of the consignee, and evidence of the terms of the contract between the railroad company and the connecting carrier is proper in an action by the consignee against the connecting carrier for the loss of the goods.¹

When a carrier receives goods destined for a point beyond his own line, the question whether he contracts to carry the goods to their destination, or only to deliver them safely to the next carrier, is one of fact for the jury, dependent upon the circumstances.

A shipper delivered goods to a railroad company, to be

¹ *Patterson v. Clyde*, 67 Pa. 500 (1871).

carried beyond the terminus of the company. The agent of the company told him that "they could send it on, and collect back to this office, and I will do that if you will pay me promptly the express charges when I get the return." The court decided that this was sufficient evidence to submit to the jury to determine whether the railroad company had contracted to carry the goods to their destination.¹

Duties as Forwarders.

294. Forwarders are not insurers as common carriers, but are only liable as ordinary bailees to carry for hire. An express company accepted a package of money to be sent from Titusville to Lancaster. In the printed receipt the company agreed to "forward to the nearest place of destination reached by this company." They also stipulated that they were not to be liable "except as forwarders only, . . . or for any default or negligence of any corporation or person to whom" the package should be delivered, and such person, etc., was to be taken to be the agent of the consignor. To reach Lancaster the package was carried by three other express companies. The consignee at Lancaster refused to receive it, and directed it to be returned to Titusville, to which place it was carried by the same routes. On its arrival there it was found that part of the money had been abstracted. It was held that the company was liable as carrier to the end of their own route, and that afterward they were forwarders responsible only for reasonable care and diligence in the selection of proper carriers. It was also held that the company was not bound to show when, where, or by whose negligence the money was lost.²

¹ Philadelphia & Reading R. R. v. Ramsey, 89 Pa. 474 (1879).

² American Express Co. v. Second National Bank, 69 Pa. 394 (1871).

In the absence of a special contract, the obligation of the carrier of goods is to transport them by the usual route proposed by him to the public, and to deliver them within a reasonable time. This rule applies as well where he confines his undertaking to the route of his own carriage as where he extends it to forward goods to points beyond. He must use reasonable expedition, but is not bound to extraordinary exertions, or to incur extra expense in order to surmount obstacles not caused by his own default, but by the weather or other act of Providence. Thus where the established route of the carrier is by rail to Philadelphia, and by water to Boston, he is not bound to send goods by rail from Philadelphia, when there is an obstruction by ice, which prevents water communication.¹

A railroad company which disregards a shipper's instructions and forwards merchandise by steamer instead of by rail, is liable for a loss of the goods by fire on the steamer.

The plaintiff lived at Akron, in the county of Lancaster, Pa., and he shipped over defendant's road five cases of cigars to Benhayon & Gonzales, St. Augustine, Florida. Each case was marked "via Philadelphia, care of Atlantic Coast Line, by fast freight." When the cars reached Philadelphia, the defendant company instead of shipping them as directed by rail, delivered the said five cases to the "Ocean Steamer Company" of Savannah, and sent them by sea. They were destroyed by fire *en route*. It was held that the carrier was liable for the loss.²

Right of Connecting Carriers to Benefit of Limitations.

295. The limitations in a bill of lading apply only to the carrier which gives the bill of lading where the goods

¹ Empire Transportation Co. v. Wallace, 68 Pa. 302 (1871).

² Philadelphia & Reading R. R. v. Beck, 125 Pa. 620 (1889).

are to be carried only to the terminus of the carrier's line, although there may be an implied agreement to forward them beyond the terminus. The Pennsylvania Railroad Company gave a receipt for oil to be delivered to "Leech at the company's freight station, Philadelphia;" appended to the receipt was, "Rate to Red Hook, 65 cents. . . . This oil is carried only on open cars and entirely at the owner's risk from fire and leakage while in possession of the railroad company or carriers, while standing or in transit." The freight was to be paid at Red Hook. The Camden & Amboy Railroad Company gave a receipt to Leech, agent of the Pennsylvania Railroad, for the oil to be transported to New York. The oil was destroyed by fire between Philadelphia and Red Hook. It was held that the Camden & Amboy Railroad were liable, there being no other contract with them than their receipt, which did not limit their common-law liability as carriers.¹

In case of a through bill of lading the rule is different. A railroad company issued a through bill of lading in which its liability was limited to an agreed valuation. It was also provided that the first carrier's liability was to cease upon delivery of the horse in good order to a connecting carrier. The horse was injured while in the hands of a connecting carrier. It was held that the limitation of liability applied in favor of the connecting carrier.²

¹ Camden & Amboy Railroad v. Forsyth, 61 Pa. 81 (1869).

² Fairchild v. Philadelphia, Wilmington & Baltimore R. R., 148 Pa. 527 (1892).

CHAPTER XXI.

BAGGAGE.

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| 296. Railroad is a Common Carrier as to Baggage. | 300. Loss on Connecting Carrier. |
| 297. Disclosure of Contents of Baggage. | 301. Measure of Damage. |
| 298. Presumptions. | 302. Sale of Baggage under the Act of 1863. |
| 299. Loss of Baggage in Sleeping-Cars. | 303. Conflict of Laws. |

Railroad is a Common Carrier as to Baggage.

296. A railroad company is a common carrier in respect to the baggage intrusted to its care.¹

As a carrier it has a right to make reasonable regulations; so far as the reasonableness of such regulations depends upon the existence of particular facts and circumstances, it is necessarily a question for the jury, under proper instructions from the court; but if the facts are undisputed the question is a proper one for the court. There are strong reasons why the reasonableness of railroad regulations should be submitted to the court as a question of law rather than to the jury as one of fact. Ordinarily jurors are not aware, nor can they readily be made aware of all the reasons calling for the rule. What one jury might deem an inconvenient rule another might approve as judicious and proper. There would be no uniformity.²

A railroad company had five passenger stations within

¹ *Laing v. Colder*, 8 Pa. 479 (1848).

² *Pittsburgh, Cincinnati & St. Louis Ry. v. Lyon*, 123 Pa. 140 (1889).

the corporate limits of Pittsburgh, viz.: Temperanceville, Point Bridge, Birmingham, Fourth Avenue, and Union Depot, the eastern terminus of the road. Birmingham station, about a mile south of the latter, and diagonally across the street from the eastern or terminal station of the Pittsburgh & Lake Erie Railroad, was a regular stopping place for passenger trains, and admittedly the most convenient point for transfer of passengers and baggage coming into the city on plaintiff in error's road and proceeding westward by the Pittsburgh & Lake Erie road. The time between the arrival of a morning train on the former and departure of a train on the latter road was about twenty-five minutes, amply sufficient to make transfer from one road to the other at Birmingham station. Plaintiff below bought from the Pittsburgh & Lake Erie Company's agent at Washington, Pa., a ticket for passage from Pittsburgh to New Orleans. He then applied to plaintiff in error's agent for a ticket from Washington to Birmingham station, intending to proceed thence on his journey without any delay at Pittsburgh; but being informed that it would be necessary for him to buy a ticket to Union Depot station, he was obliged to accept that or nothing. He then requested that his baggage be checked to Birmingham station, or so marked that it could be delivered to him there. That was also refused, and he then notified the baggage-master that on arrival of train at that station he would demand and expect to receive his baggage. The demand was accordingly made, but it was unheeded, and the trunk was carried to the Union Depot. The alternative was thus presented of either waiting in Pittsburgh until he could obtain his baggage or proceeding on his journey without it. He chose the latter, stopped off at Cincinnati, and there awaited the arrival of his baggage, which, by his direc-

tion, was obtained and forwarded after him. The court held that the rule was an unreasonable one, and sustained a verdict of \$200 for the plaintiff.¹

Disclosure of Contents of Baggage.

297. A shipper is not bound to disclose the contents of his baggage if not requested to do so. In *Camden & Amboy R. R. Co. v. Baldauf*,² a ticket contained the following notice: "Fifty pounds of baggage will be allowed to each passenger in this line, and passengers are expressly prohibited from taking anything as baggage but their wearing apparel, which will be at the risk of the owner." The trunk of the plaintiff contained specie, but the plaintiff, who was a German, was not able to read the notice, which was in English. The court held that plaintiff could recover the value of the specie.

A railroad company is not liable for undisclosed articles in baggage other than wearing apparel.³

Presumptions.

298. Where baggage is lost and no proof is given as to when or how it was lost, the presumption is that it was lost or mislaid through the negligence or fraud of the carrier or his agent. In *Camden & Amboy R. R. Co. v. Baldauf*, it appeared that the plaintiff delivered a trunk to the defendant; that the extra weight of the trunk was paid for, and the agent of the defendant took charge of it; that the trunk was lost and not delivered to the plaintiff on his arrival at Philadelphia or at any time thereafter. It did not appear when or how the trunk was lost. The court held that the legal inference was that the trunk was

¹ *Pittsburgh, Cincinnati & St. Louis Ry. v. Lyon*, 123 Pa. 140 (1889).

² 16 Pa. 67 (1851).

³ *Baker v. North Pennsylvania R. R.*, 5 W. N. C. 292 (1878).

lost or mislaid in consequence of the negligence or fraud of defendant's agents.¹

Loss of Baggage in Sleeping-Cars.

299. A sleeping-car company is bound to provide reasonable precaution to prevent the valuables of the passenger from being stolen from him while he is asleep. In a case where the valuables of a passenger were stolen from his berth while he was asleep, the court said: "Conceding that the company is not liable in this action as an innkeeper or common carrier, yet a reasonable and proper degree of care is imposed on the company. Whether it did exercise that degree of care under the circumstances was for the jury. The main object in taking passage in such a car is to permit the passenger to sleep. While in that helpless condition a duty rests on the company to provide reasonable care and precaution against the valuables of a passenger being stolen from his bed or from the clothes on his person. This is not the case of a robbery by force and violence, but by stealthy larceny. Unless a watchman be kept constantly in view of the centre aisle of the car, larceny from a sleeping passenger may be committed without the thief being detected in the act. While the fact that another passenger in the same car was robbed the same night was not relevant to prove that the defendant in error was in fact robbed, yet it was admissible as bearing on the absence of proper care by the company."²

A sleeping-car company is not a common carrier, and cannot be held liable for the loss of valuable goods carried in a valise whose contents were not disclosed by the passenger.³

¹ 16 Pa. 67 (1851); *Schlessinger v. Adams Express Co.*, 9 Phila. 70 (1872).

² *Pullman Car Company v. Gardner*, 3 Pennypacker, 78 (1883).

³ *Pfaelzer v. Pullman Palace Car Co.*, 4 W. N. C. 240 (1877).

In an action to recover damage for loss of valuables stolen from a passenger's person while asleep in a sleeping-car, declarations of the porter of the car that during the night, he went to the toilet stand, from which the berths were not visible, to black the boots of a passenger, are admissible to show lack of proper operations on the part of the company to protect the passenger.¹

A berth-check, given to a passenger on a sleeping-car when he entered the car in exchange for his ticket, contained the notice: "Wearing apparel or baggage placed in the car will be entirely at the owner's risk." It was held in an action to recover damages for the loss of valuables stolen from the passenger's person while asleep in his berth that the check was not evidence.²

Loss on Connecting Carrier.

300. Where a railroad agent sells a through ticket to a passenger, and checks his baggage through, and the company's agent expressly promises that the baggage shall be delivered to plaintiff at the point of destination, the company is liable for the loss of the baggage on a connecting line.³

If the company in selling a ticket for a point beyond its own line stipulates that it acts only as an agent for the connecting line, and assumes no liability beyond its own line, a passenger cannot recover from the company for a loss of baggage not occurring on its line. In the *Pennsylvania Central R. R. Co. v. Schwarzenberger*,⁴ the plaintiff bought at Philadelphia a ticket for Cincinnati which contained the following notice: "In selling this

¹ *Pullman Car Company v. Gardner*, 3 Pennypacker, 78 (1883).

² *Pullman Car Company v. Gardner*, 3 Pennypacker, 78 (1883).

³ *Baker v. North Pennsylvania R. R.*, 5 W. N. C. 292 (1878).

⁴ 45 Pa. 208 (1863).

ticket for passage over roads west of Pittsburgh, the Pennsylvania Railroad Company acts only as agent for the western lines, and assumes no responsibility west of Pittsburgh." The plaintiff's baggage was lost at some point west of Pittsburgh. The court held that he could not recover. STRONG, J., said: "The facts in this case are, in very essential particulars, unlike those which appeared in *The Camden & Amboy Railroad Co. v. Baldauf*, 4 Harris, 67, and they called for the application of different principles. We have here no question relative to notice by common carriers, or its effect in limiting their common-law liability. Nor need we inquire whether the defendants had power to contract for the carriage of the plaintiff and his luggage beyond the terminus of their railroad. Conceding that they had, the evidence is very satisfactory that they did not. The plaintiff took passage at Philadelphia for Pittsburgh, and thence for Cincinnati. The carpet-bag, for the loss of which, with its contents, this suit was brought, was offered by him as his baggage, and was received as such. There is no pretense that it was offered or taken as freight. Nothing was offered or paid for its carriage apart from what was paid for the plaintiff's own carriage as a passenger. It was offered in the usual form of personal luggage, and there was nothing to indicate a desire of the plaintiff, or intention of the defendants that their obligation to transport safely the carpet-bag should be distinct from or greater than their obligation to transport safely the person of the plaintiff. In fact, the luggage was understood and treated as inseparable from the passenger. What was then the contract between the parties? The defendants are not common carriers except between Philadelphia and Pittsburgh. They are under no obligation to carry the plaintiff beyond the termination of their route, or to transport his luggage. It is true,

they received the fare for the whole distance from Philadelphia to Cincinnati, and if that were all, it might raise a presumption of an agreement to carry over the entire route between the two cities. But contemporaneously with the receipt of the fare, and as evidence of the contract into which they entered, they gave to plaintiff a ticket, informing him that they assumed no responsibility for his carriage, and of course for the carriage of his baggage, beyond Pittsburgh. They notified him that they acted only as agents for the carriers whose route extended westward from Pittsburgh, and not at all for themselves. With this express disclaimer of personal liability there is no possibility of implying an engagement. It is not to be doubted that the defendants could act as agents for a connecting railroad line, and, if they could, the contract for carriage from Pittsburgh and Cincinnati was with the principals of the defendants and not with themselves. Their own engagement was performed when they had transported the plaintiff to Pittsburgh and delivered his baggage to the carriers on the connecting railroad beyond, leading to Cincinnati. It is settled, in this State, that a carrier may limit his responsibility even upon his own route by a general notice that the baggage of a passenger is at the risk of the owner, provided the terms of the notice are clear and explicit, and provided the notice is brought home to the employer: *Beckman v. Shouse*, 5 Rawle, 189; *Bingham v. Rogers*, 6 W. & S. 500; and *Laing v. Colder*, 8 Barr, 484. He may not, however, release himself from responsibility for want of ordinary care. Here, however, was no attempt by the defendants to limit their responsibility as common carriers. There was nothing more than an express refusal to assume an additional and unusual liability, a careful

guarding against the implication of a contract, which, without the notice, might have arisen from the fact that the passage-money for the entire distance to Cincinnati was here received: *Fowles v. The Great Western Railway Co.*, 7 Exch. 699.

"This is the whole case. The plaintiff breaks down in the beginning. He fails to prove that these defendants contracted to carry him and his baggage beyond Pittsburgh. His remedy, therefore, is not against them but against the company which undertook for that portion of the route upon which the carpet-bag was lost."

Measure of Damage.

301. The value of goods contained in baggage of a passenger are to be estimated at what they would cost him in the place where he brings suit, not what they actually cost him in a distant State.¹

Sale of Baggage Under the Act of 1863.

302. Where a railroad company sells trunks for freight or storage under the Act of 1863, which authorizes common carriers to expose goods for sale, the trunks should be opened. "The fair meaning of 'expose' in this statute obviously is 'to exhibit,' 'to bring into view,' 'display,' to 'point out or to show the bystanders.' Selling the trunks with the goods locked up in them, and describing the contents as unknown, withholds from the bidders all knowledge of the character or value of the contents, and clearly was not within the meaning of the law which directs the manner of sale. This manner of selling goods of value is unjust to the owner. It is no answer for a

¹ *Douglass v. Railroad Co.*, 1 Phila. 337 (1852).

corporation to say that by this method its sales in the aggregate produce quite as large a sum as if the articles were exposed to view. The company may not suffer, yet great injustice be done to the owner of valuable goods. There is no just reason why his goods should be sold at a sacrifice to enable the almost worthless property of another to be sold for more than its value. Such a mode of selling is unjust to the bidders; generally they will not stand upon equal ground. The strong probability is that the contents will be known to one or more of the agents, and all packages that are really valuable will be struck down at low prices to some one acting in the interest of the knowing agent. In this very case the evidence shows that the contents of the trunks were actually examined by one of the agents of the company before the sale, yet each was sold as contents unknown, for a few dollars. To whom they were sold, or what became of the contents, the evidence fails to disclose."¹

An agreement by an agent of a common carrier, made in the course of the business intrusted to him, is binding on the carrier, although in excess of his instructions. Thus where an agent of an express company, without authority from the company, agreed that the company should keep and store certain trunks for a year, the company was bound to keep the trunks for a full year before selling them for freight.²

Conflict of Laws.

303. Where a ticket is bought in Philadelphia for transportation to Atlantic City, and the corporation selling the ticket is a New Jersey corporation, the liability for the loss of a trunk of the passenger is governed by

¹ Per MERCUR, J., in *Adams Express Co. v. Schlessinger*, 75 Pa. 246 (1874.)

² *Adams Express Co. v. Schlessinger*, 75 Pa. 247 (1874).

the law of New Jersey, and not by the law of Pennsylvania, and it makes no difference that the undertaking was in part to carry the trunk across the Delaware River, as the inhabitants of both States have equal rights of navigation and passage on that stream.¹

¹ *Brown v. Camden & Atlantic R. R. Co.*, 83 Pa. 316 (1877).

CHAPTER XXII.

CARRIERS OF LIVE STOCK.

304. Duties of Carriers.

306. Act of God.

305. Liability for Negligence.

Duties of Carriers.

304. The common-law duties and liabilities of common carriers attach to the carriers of live stock. If they hold themselves out to the world as carriers of this species of property, they are bound to receive and transport all that is offered to them on the tender of reasonable compensation for the service. An actual tender is not necessary if the party avers and proves his readiness and willingness to pay the money for the carriage. They are bound to provide suitable vehicles for the transportation, with all reasonable equipments, and servants to take care of them, and in general, to use all the diligence which prudent and cautious men usually employ for the preservation of property intrusted to their care, whilst they are not liable for the wear and tear and such deterioration as are necessarily incident to the transportation, the general rule is that they are responsible for all losses not occasioned by the act of God or the public enemy. These liabilities may be varied by special agreement, provided it be not against public policy.¹

¹ *Ritz v. Pennsylvania R. R.*, 3 Phila. 82 (1858). The liability may be limited to a particular amount; *Fairchild v. Philadelphia, Wilmington & Baltimore R. R.*, 148 Pa. 527 (1892).

Cattle were shipped at Uniontown, Pennsylvania, on Wednesday afternoon, December 23, 1874, to be carried to Philadelphia. While *en route* an accident occurred to the train, and one of the cars containing McShane's cattle was broken down, the cattle thrown out, and a steer so badly injured that it was taken possession of by the company and killed. The remainder were taken out of the car, reloaded, and sent on, reaching Baltimore *en route* on Friday morning, December 25. At that place they were taken out and fed, rested six hours, and again sent on, arriving in Philadelphia on Saturday morning, December 26. The bill of lading provided that the shipper should assume all risk of any loss or damage which might be sustained by reason of any delay. The court left the question of the company's negligence to the jury, and a verdict was returned for plaintiff. On writ of error the Supreme Court sustained the judgment, and held that the delay referred to in the bill of lading meant the ordinary delays of the business, and not delays arising from the negligence of the company.¹

A railroad company is bound to superintend the loading of live stock, and if it simply turns over cars to the shipper, telling them they could put into each car as many sheep as they pleased, and the cars are crowded and the sheep injured, the company is liable. "The companies are presumed to know better than freighters and drovers how many tons weight or how many animals each car can carry safely, and it is due, alike to the comfort of the dumb beast and to the interest of all concerned in the transportation, that the skill and experience of the agents in charge should dictate everything that pertains to the taking or carrying and discharging the load. The less inexperienced persons have to do with these matters

¹ Pittsburgh & Connellsville R. R. v. McShane, 5 W. N. C. 228 (1878).

the better, and to turn such duties over to them is negligence on the part of the company's agents." ¹

If a railroad company crowds more than a hundred sheep into a car fitted to carry only eighty or eighty-five, and the sheep are thereby injured and killed, the company is liable in damages. ²

Liability for Negligence.

305. A railroad company as a carrier of live stock cannot relieve itself from liability for its own negligence. Thus a company is not relieved from liability by a general release signed by the shipper where it appears that the live stock were killed or injured by the train running off the track from accidentally running over one of the drovers in charge of the cattle, and it also appears that the drover fell off because no proper place was provided for him to ride, and he was compelled to stand upon the bumpers. ³

A contract by which the company is relieved from all claims for injury to live stock, does not relieve the company from a loss of the stock by a fire caused by the presence of straw or other combustible materials in the car in which the stock are being transported. ⁴

If live stock die while in course of transportation, under a bill of lading relieving the carrier from loss, except for negligence, and there is no evidence of an accident to the means or appliances of transportation, and it does not appear what caused the death of the animals, the carrier is not liable. In such a case the mere death of the animals raises no presumption of negligence on the

¹ *Ritz v. Pennsylvania R. R.*, 3 Phila. 82 (1858).

² *Ritz v. Pennsylvania R. R.*, 3 Phila. 82 (1858).

³ *Goldey v. Pennsylvania R. R. Co.*, 30 Pa. 242 (1858).

⁴ *Powell v. Pennsylvania R. R. Co.*, 32 Pa. 414 (1859).

part of the carrier. Plaintiff shipped a carload of horses, eighteen in all, over the railroad of the defendant, from Walkersville, Maryland, to Philadelphia. The bill of lading provided that the shipper should "send a proper person or persons in charge of said stock, and assume all risks of damages and injury to, delay, depreciation, and escape of said stock while in transit, releasing said company and other carriers from all claims or demands therefor, except when proved to have occurred through gross negligence." The plaintiff, in accordance with his undertaking to send a proper person in charge of the stock, went himself upon the train with it, and, as he testified on the trial, went to the car in which his horses were every time the train stopped and looked into it, but saw nothing to attract his attention. When the train arrived in Philadelphia, one of the horses was found dead in the car, and this action was brought to recover its value from the railroad company. The plaintiff showed that he shipped the horses, eighteen in number, for Philadelphia, and that on the arrival of the train one of them was dead; but he did not show whether the horse died from disease, or fright, or injuries received in the course of the transportation, nor was it alleged that any accident happened to the train, or the car in which the plaintiff's horses were, while on the journey. It was held that plaintiff was not entitled to recover.¹

Act of God.

306. The obstruction of a railroad by snow-storm is an act of God, and excuses the company for not receiving live stock for transportation, and for not delivering with customary dispatch such stock as it did receive.²

¹ *Pennsylvania R. R. v. Raiordon*, 119 Pa. 577 (1888).

² *Ritz v. Pennsylvania R. R.*, 3 Phila. 82 (1858).

CHAPTER XXIII.

RATES.

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| 307. General Principles as to Discrimination. | 314. Voluntary Payment of Excessive Rate. |
| 308. Different Kinds of Goods. | 315. Form of Statement Under Act of 1883. |
| 309. Discrimination against Goods to be Forwarded. | 316. Evidence. |
| 310. Arrangement to Increase Business. | 317. Preliminary Injunction. |
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General Principles as to Discrimination.

307. A railroad company as a common carrier owes a duty of equality to every citizen. A charge made to one shipper greater than to another for the same service under like circumstances, constitutes undue preference and discrimination, and consequently renders the charge unreasonable.¹

¹ *Borda v. Philadelphia & Reading R. R.*, 141 Pa. 484 (1891); *Hoover v. Pennsylvania R. R.*, 156 Pa. 220 (1893); *Delaware & Hudson Canal Co. v. Pennsylvania Coal Co.*, 21 Pa. 131 (1853); *Com. v. Delaware & Hudson Canal Co.*, 43 Pa. 295 (1862); *Sandford v. Catawissa, Williamsport & Erie R. R.*, 24 Pa. 378 (1855); 2 *Phila.* 107 (1856); *Camblos v. Philadelphia & Reading R. R.*, 4 *Brewster*, 563 (1873); *Twells v. Pennsylvania R. R.*, 2 *Walker*, 450 (1863); *Wigton v. Pennsylvania R. R.*, 25 *W. N. C.* 574 (1890); 8 *Pa. C. C. R.* (1890).

The 3d section of the seventeenth article of the Constitution of 1874 is in the following words:

SECTION 3. All individuals, associations, and corporations shall have equal right to have persons and property transported over railroads and canals, and no undue or unreasonable discrimination shall be made in charges for or in facilities for

A common carrier can charge no more than a reasonable compensation for the proper service. The charge may, under different circumstances, vary in amount without being therefore necessarily unreasonable. If reasonable, it may, though unequal, be unobjectionable; but, in general, equality is the standard of both unreasonableness and impartiality. It may be added that systematic, as distinguished from occasional inequality, never can be unreasonable and impartial. Equality, however, means of course relative, as distinguished from a simple ratable equality by weight or bulk. Ratable difference, which is not relative inequality, may consist in proportions of bulk to weight, in the divisibility or indivisibility of masses, or other conveniences or inconveniences for packing of transportation or delivery, or may depend upon degrees

transportation of freight or passengers within the State or coming from or going to any other State. Persons and property transported over any railroad shall be delivered at any station at charges not exceeding the charges for transportation of persons and property of the same class in the same direction to any more distant station; but excursion and commutation tickets may be issued at special rates.

For the purpose of enforcing provision of the Constitution the legislature enacted the law of June 4, 1883 (P. L. 72), the 1st and 2d sections are as follows:

SECTION 1. That any undue or unreasonable discrimination by any railroad company or other common carrier or any officer, superintendent, manager, or agent thereof in charges for or in facilities for the transportation of freight within the State or coming from or going to any other State is hereby declared to be unlawful.

SEC. 2. No railroad company or other common carrier engaged in the transportation of property shall charge, demand, or receive from any person, company, or corporation for the transportation of property, or for any other service, a greater sum than it shall receive from any other person, company, or corporation for a like service from the same place upon like conditions and under similar circumstances; and all concessions in rates and drawbacks shall be allowed to all persons, companies, or corporations alike, under similar circumstances and during the same period of time. Nor shall any such railroad company or common carrier make any undue or unreasonable discrimination between individuals or between individuals and transportation companies, or the furnishing of facilities for transportation. Any violation of this provision shall make the offending company liable to the party injured for damages treble the amount of injury suffered.

of liability to undergo or cause injury or deterioration.¹

Different kinds of freight may be subject to different charges, but generally advantages cannot be given to one shipper, or class of shippers, greater than those which are allowed to all others. When such companies furnish cars and motive power, and when they become common carriers, they are under obligations to receive all goods offered to them for carriage, to transport them in the order of their receipt, and at a rate of compensation that are alike to all. When the service is the same, the compensation demanded must be the same also. And the rule is not the less general or imperative because there are some seeming qualifications of it. It may be that it is competent for a railroad company to enter into special agreements whereby advantages may be secured to individuals in the carriage of goods upon their railway, if it is manifest that in entering into such agreement, they have only the interest of the company in view, and when they are willing to afford the same facilities to all others on the same terms. Thus it has been held that railway companies may agree to carry at less than the ordinary charges, in consideration of the guarantee of large quantities and full train loads at regular periods, provided the real object to be maintained thereby is a greater remunerative profit by the diminished cost of carriage, although the effect may be to exclude from the lower rate those persons who cannot give such a guarantee.²

Equality between all must exist up to a railroad's capacity to accommodate at the same rates for transportation and as far as possible in accommodation. The com-

¹*Camblos v. Philadelphia & Reading R. R.*, 4 Brewster, 563 (1873). Per CADWALLADER, J.

²*STRONG, J.*, in *Twells v. Pennsylvania R. R.*, 2 Walker, 450 (1863).

pany cannot discriminate in favor of itself, or any of its employees as against other freighters or transporters.¹

The interest of a railroad company requires that the element of price, whether by a sliding scale or otherwise, must be permitted to enter into the rate of transportation, and a discrimination based on that element is not an arbitrary or unreasonable discrimination, offending against the rule of equality.²

Different Kinds of Goods.

308. Different kinds of goods may be charged different rates. In *Coxe Brothers v. Lehigh Valley R. R.*,³ plaintiffs complained that the railroad was "carrying bituminous coal from . . . Snow Shoe district to various points in the State of New Jersey and New York at less than one-half the rate per ton per mile charged . . . for the transportation of anthracite coal carried contemporaneously with the bituminous under substantially similar circumstances and conditions over the same line and in the same direction." They further complained that "the anthracite coal districts are much nearer to the Atlantic tidewater and other markets out of the State of Pennsylvania in which the railroad carries anthracite coal than is the Snow Shoe district, from which it carries bituminous coal to the same markets." They further complained that, "by reason of the discrimination in the charges made by the railroad in favor of bituminous coal and against anthracite, the complainants are excluded from market for certain sizes and qualities of their anthracite coal, and the said markets are taken away from them by the shippers of bituminous coal." They further averred that "there are large and important customers of anthracite

¹ *Cumberland Valley R. R. Co.'s Ap.*, 62 Pa. 218 (1869).

² *Borda v. Philadelphia & Reading R. R.*, 141 Pa. 484 (1891).

³ 3 *Inter-state Commission Rep.* 460 (1891).

coal in the Atlantic seaboard and other markets in the States of New Jersey and New York reached by the lines of the said railroad who would prefer to contract for their coal by a yearly or season contract at a fixed price, delivered to the customers for the year or season, . . . and that the said railroad company discriminates in favor of . . . the said . . . coal company, either by agreeing to transport the said contract coal at a fixed rate during the existence of the contract, which it does not do in the case of the complainants or other shippers generally." . . .

The railroad admitted that "its charges are higher on anthracite coal than on bituminous," but "denies that bituminous is a like kind of traffic with anthracite, or that both are carried by it under substantially similar circumstances and conditions, and avers that bituminous coal is found in different localities from anthracite; is mined in a different way, at very much less cost; it is used mainly for manufacturing and anthracite for domestic purposes, and the competition between them is comparatively slight." . . .

The commissioners in sustaining the railroad company said: "Carriers in making separate classification, or rates for different coals, take into consideration not only the expense of transportation, but the value of the freight and the worth of the transportation to the shipper; the exceptional qualities which fit the more valuable anthracite for domestic and special uses and cause its large consumption in less distant markets; the shorter distances from the mines to the principal markets rendering the transportation proportionately more expensive, and the necessity for so apportioning the transportation charges between the anthracite of different sizes and values that the more valuable may bear the greater charge.

"Transportation is sought by the shipper for the profit it yields, and will cease when it becomes unprofitable. In the ordinary course of business, income or profits are proportioned to the investment, and a car-load of ten tons of anthracite coal, worth \$50, affords larger profits and can better bear full transportation charges than a like quantity or car-load of bituminous worth \$20, and the value of the freight with the worth of the transportation service to the shipper are taken into account in determining classification.

"The rule insisted upon, and claimed to be specially applicable to coal, that the cost of the service alone should determine the freight classification and freight charges, will apply as well to different sizes and values of anthracite as to bituminous and anthracite. Under such a rule, the different sizes now carried at different rates would be one freight and take the same rate, while a difference is now made of 30 to 50 cents per ton between the larger and smaller sizes. Let it be assumed that \$1.70, the average anthracite rates to Perth Amboy complained of, was 30 cents too high, and that \$1.40 was the reasonable rate for all anthracite. This is now the rate on pea, the best of the lower grades of anthracite, while on buckwheat and culm it is but \$1.20. Classification of anthracite in disregard of sizes and values would add 20 cents per ton to the charges on some, and reduce them on none of these lower grades of coal. The undue preference complained of is chiefly the alleged exclusion of these certain grades of anthracite from market by discrimination in rates. The result of classifying and rating all coal, including these lower grades or smaller sizes as one freight, would be that the smaller anthracite coal at the increased rate would be at still greater disadvantage than they now are, and for ordinary steaming would be

cut out by bituminous, while for the uses in which anthracite is indispensable the larger sizes at the same rate would displace the smaller. The consequence would be that twenty-five per cent. in quantity, or about ten per cent. in present value, of all anthracite mined, would be unable to bear the burden of transportation, and would be waste until such time as it could be locally converted into power and the power transmitted. There is, therefore, for the present no hardship, but economy, in making the best bear some of the burden of the inferior, which is not a voluntary but a resulting production. To determine and make waste of lower grades is to impose on the higher grades the entire cost of producing both."

Discrimination against Goods to be Forwarded.

309. A railroad company is not permitted to discriminate in freight rates merely because the shipper intends to forward the goods to their final destination by another route after reaching the terminus of the first company's road.

Plaintiff shipped coal oil by defendant's railroad to Philadelphia. He there intended to reship it by another route to New York. It was held the defendant had no right to charge plaintiffs a rate higher than that ordinarily charged between Pittsburgh and Philadelphia. STRONG, J., said: "The defendants are authorized by their charter to be common carriers on their railroad from Pittsburgh to Philadelphia, with power to establish, demand, and receive such rates of toll or other compensation for the transportation of merchandise and commodities as to the president and directors shall seem reasonable. It is admitted that in the exercise of these powers they must treat all customers alike. Now it is clear that if they receive coal oil at Pittsburgh to be carried to Phila-

delphia, it can make no difference to them either in the risk or cost of transportation whether Philadelphia is the point of ultimate destination of the oil or whether the consignee intends that it shall afterward be started anew on another line and forwarded from Philadelphia to New York. The point of final destination of the freight is a matter in which they have no interest as carriers over their own road. If it be admitted they may contract to carry freight to points beyond Philadelphia or Pittsburgh, over connecting lines, it is still true that as to all carriage beyond the terminal of their own road they stand in the position of third parties, and they can no more secure to themselves an advantage over other carriers on the connecting lines by discriminating in tolls on their own than they could secure similar advantages to one shipper or another in the same way. Yet this is the practical effect of the regulation which the defendants are seeking to enforce against the complainant, and we cannot doubt that such is their object in making it. They in reality say to him, 'employ us to carry your oil, not only over our road to Philadelphia, but thence to New York. If you do not, we will exact from you for its carriage to Philadelphia six cents per hundred pounds more than we demand from all others who employ us to transport similar freight to Philadelphia. Or if you will employ us to carry it to New York after it shall have reached Philadelphia, we will carry it to Philadelphia for six cents less per hundred pounds than we are accustomed to charge others for similar transportation.' No one will maintain that they can lawfully make such a stipulation for the benefit of a third party—*e. g.*, one or two other carriers. They cannot say to a shipper at Pittsburgh of any domestic product, 'You have freight destined to New York. You must send it over our road to Philadelphia. If,

when it arrives there, you will forward it by A, to New York, we will carry it over our line at certain rates. If you send by another than A, our charges will be higher.' This is a discrimination that cannot be allowed. Conceding it would put in the power of the defendants a monopoly of the carriage of all articles which pass over their road from either terminus to every place of final delivery. The oppressive effects of such a rule are the same, whether its motive be to benefit third parties or the railroad company itself. Of transportation along the line of their road, the defendants practically have a monopoly. It is not consistent with the public interests, or with common right that they should be permitted so to use it as to secure to themselves superior and exclusive advantage on other lines of transportation beyond the ends of their road. If they contract to carry freight to distant points in other States and countries, they should stand on the same footing with other carriers, over other roads and lines than their own. If they may use their exclusive power over their road so as to force into their own hands an external carrying trade, and do this at the expense of a shipper or class of shippers, it is quite possible for them to exclude our domestic products from all foreign markets. Shippers of such products might be compelled to seek a final market in Philadelphia under penalty of such increased rates of toll beyond as to make it impossible for them to find any other place of sale. These consequences, more or less aggravated, according to the will of the defendants, and according to interests they may have distinct from those which belong to them as owners of their road, flow naturally from treating the destination or use to be made of freight after it has left the road to affect the price of carriage over it."¹

¹ *Twells v. Pennsylvania R. R.*, 2 Walker, 450 (1863).

Arrangement to Increase Business.

310. Railroad companies have an undoubted right to enter into a just and fair arrangement with a corporation or association, whereby their business will be increased, although the effect of the arrangement may be to take business from other persons or companies, engaged in transportation.

Plaintiffs were engaged in the transportation of crude petroleum in boats and barges on the Allegheny River from the oil regions to Pittsburgh. The Allegheny Valley Railroad Company was engaged in carrying oil to Pittsburgh in cars. The Allegheny Valley Railroad crossed the Pennsylvania Railroad at Allegheny Junction. To compete more successfully with plaintiffs, the Allegheny Valley Railroad carried crude petroleum to the refineries at Pittsburgh, and the manufactured product back to Allegheny Junction, at a uniform rate, thus giving to all the refiners of Pittsburgh as favorable terms as if their refineries had been located at Allegheny Junction, thus securing one uniform rate on oil from the oil regions to the seaboard. It was held that to deny this right to the Allegheny Valley Railroad would be an unwarranted interference with the management of its business, and would deprive the public of the benefit of the competition to which it was justly entitled.¹

A railroad company may charge a lower rate of freight for coal transported to a manufacturing establishment from which it obtains manufactured products for transportation, than to a coal dealer, whose business with the railroad company is limited merely to the coal transported. In such a case there is no equality of conditions which will justify the coal dealer in demand-

¹ *Munhall v. Pennsylvania R. R.*, 92 Pa. 150 (1880); *Hoover v. Pennsylvania R. R.*, 156 Pa. 220 (1893).

ing the rate which is given to the manufacturing company.¹

Through Rates.

311. A railroad company has the right to discriminate between rates charged for local freight and that which is extra-territorial when it commences its transit. In *Shipper v. Pennsylvania Railroad*,² STRONG, J., said: "The charter of the defendants authorizes them from time to time to establish, demand, and receive such rates of toll or other compensation for the use of their road, and for the motive power, and for the transportation of passengers, merchandise, and commodities as to the president and directors shall seem reasonable, not exceeding a maximum prescribed. There is no express stipulation that the rates and charges shall be equal to all who may offer goods for transportation over the road. Such stipulations are common in English railway charters, and they are found in some charters of railroad companies in this country. They are, however, but declaratory of what the common law is. It was so said in *Sanford v. The Catawissa Railroad Company*, 12 Harris, 378, and there is certainly good reason for denying such companies the power to discriminate between persons offering goods for transportation. It seems to be implied in the power given them to establish reasonable rates, that the rates must be fixed, equal, and impartial; but the principle is inapplicable to this case. Here was no discrimination against the plaintiffs, no distinction made between persons. The rates demanded from the plaintiffs for the transportation of their flour and grain were those demanded from all

¹ *Hoover v. Pennsylvania R. R.*, 156 Pa. 220 (1893).

² 47 Pa. 338 (1864).

others in like circumstances. Every shipper who started such products from an extra-territorial point of departure on the way to Philadelphia, as the place of ultimate destination, was required to pay the same prices for carriage over the railway of the defendants. The rates were established by a general rule, and of them the plaintiffs had notice before their shipments. The rule was applicable alike to citizens of Pennsylvania and to those of other States; to all who traded in such articles. No reason exists for assailing it as unreasonable, or as discriminating between customers of the road, unless it is found in the fact that 'local freight' was charged less at the time when the plaintiffs' property was delivered to the defendants for transportation. No other reason has been assigned. The rates of local freight were, however, exceptional, and authorized as such by the Commutation Tonnage Act of March 7, 1861, to which we shall presently refer. The nature of the two regulations, one for 'local freight' within the meaning of the Act of Assembly, and the other for that which is not such, has been misunderstood. In no just sense can the adoption and enforcement of a rate of tolls for the transportation of merchandise which is the subject of domestic trade, and a different rate for similar articles imported and carried in the conduct of a foreign or extra-territorial trade, be regarded as a discrimination between individuals. The benefits of reduction on domestic trade are extended to all persons alike, and the burdens upon that which is not domestic are imposed equally upon all. We are not prepared to say that a railroad company may not discriminate in its rate of tolls in favor of domestic trade over foreign, in favor of home products over those which are extra-territorial, especially when the railroad lies wholly within the

State. Ownership may not be a reasonable ground for a distinction, but weight, bulk, value, place of production, and many other things may be."

The right of connecting railroad companies to make contracts for through rates is incident to their powers unless prohibited by their charters. Thus two railroad companies have the right either for their own convenience or the convenience of shippers upon their lines, to require the whole freight to be paid to the company that first carried it.¹

Use of Wharves.

312. A railroad company will not be restrained by preliminary injunction from refusing to allow plaintiff the use of wharves owned by the company. An allotment of such wharves to some persons rather than to others is not an illegal discrimination. "Transportation by a common carrier is necessarily open to the public upon equal and reasonable terms. An exclusive right granted to one is inconsistent with the rights of all others. This was not transportation, but wharfage, the nature of which requires exclusive possession temporarily. The railroad company as trustees for the public have a necessary discretion in the management of such interests, and the motives of their proceedings cannot be reviewed by the courts."²

Use of Warehouses.

313. A railroad company may allow its agents as consideration for their services, the privilege of buying and selling produce at the company's warehouses. The warehouses of a railroad company are not for the public accommoda-

¹ *Munhall v. Pennsylvania R. R.*, 92 Pa. 150 (1880).

² *Audensried v. Philadelphia & Reading R. R.*, 68 Pa. 370 (1871).

tion, but are necessary appendages to the company's business arrangements. No individual has rights in them, excepting as conceded to him by the company. In this respect warehouses differ from the railroad itself on which equality must prevail between all.¹

Voluntary Payment of Excessive Rate.

314. Plaintiff had a contract to ship coal from Tamaqua to Reading. The rate between those two points was \$2.71 per ton, while from Tamaqua through Reading to Sinking Spring, six miles beyond on the Lebanon Valley branch, the rate was only \$1.45 per ton. The rate from Sinking Spring back to Reading was twenty-five cents. Plaintiff shipped some of the coal to Sinking Spring, and then back to Reading, when he was notified that he must pay the full rate, the same as if he had shipped to Reading direct. The railroad company charged the difference against plaintiff, and compelled him to pay it. He subsequently brought suit to recover the money. It was held that he was not entitled to maintain the action. **WOODWARD, P. J.**, charged: "If the money was made after a demand made fairly and in good faith, and after the surrender of all possession and control of the coal by the defendants, the payment was voluntary, and the plaintiff could not recover the amount, although the payment was accompanied by a protest against the right of the defendants to recover it."²

Form of Statement under Act of 1883.

315. In an action of assumpsit to recover damages for discrimination under the Act of June 4, 1883, the statement must give the names of the persons in whose favor

¹ Cumberland Valley R. R. Co.'s Ap. 62 Pa. 218 (1869).

² Thomas v. Philadelphia & Reading R. R., 1 W. N. C. 621 (1875).

discrimination is alleged, or the instances in which the like services have been rendered at a less rate. In such an action the plaintiff cannot join a claim for damages for discrimination before June 4, 1883, and a claim for damages from discrimination after that date. The act gives the remedy of assumpsit, but for all prior damages the action must be in tort.¹

Evidence.

316. In an action against a railroad company to recover damages for unlawful discrimination, an order on the defendant to produce books and papers was refused in so far as it was sought to establish a liability of the defendant for a penalty imposed by an Act of Assembly. In such a case the refusal of the lower court to make an order was held to be merely interlocutory, and the Supreme Court quashed the appeal taken from it.²

Preliminary Injunction.

317. An injunction, restraining a railroad company from refusing to transport a commodity at the same rates and upon as favorable terms as the company transports for other persons, can only be granted upon final hearing.³

A preliminary injunction will not be granted in the suit of an express carrier against a railroad company to prevent the continuance by them of a competing business in which they were engaged, as he alleged, without authority in their charter; also to compel the allowance by them of certain disputed facilities and accommodations which he claimed in his own business upon their line; and also to

¹ *Struble v. Pennsylvania R. R.*, 23 W. N. C. 197 (1888).

² *Logan v. Pennsylvania R. R.*, 132 Pa. 403 (1890).

³ *Audenreid v. Philadelphia & Reading R. R.*, 28 Leg. Int. 12; *Mecanauqua Coal Co. v. Northern Central Ry.*, 4 Brewster, 158 (1872).

prevent the continuance by them of certain alleged overcharges for transporting his express freights.¹

Express Companies.

318. A railroad company as a common carrier bound to receive and transport goods offered to it, must receive for transportation goods offered to it by an express company, but it cannot give to one express company an exclusive right of transportation in passenger trains. In *Sandford v. Catawissa, Williamsport & Erie R. R.*,² LEWIS, C. J., said: "The business of carrying what is called 'express matter,' has recently grown up, and is productive of great public advantage. The objection to carrying such matters, on the ground of the novelty of the business, has nothing in it deserving serious consideration. If all the improvements of this progressive age are to be excluded from railroad transportation because they were not in existence when the charters were granted for the roads, the public would soon be deprived of the chief value of these important works. The law is not so unreasonable in its constructions. The rights of express agents or carriers have been fully recognized in this respect in England. They are entitled with equal benefits with others, and no exclusive advantages can be granted to others to their injury: 10 Mees. & W. 397; 3 English Railway Cases, 193; 49 Eng. Com. Law Rep. 253; 73 Eng. Com. Law Rep. 583."

A railroad company may have an option whether to engage or not in the accessorial or incidental carriage off the rails, by horse power, to and from the depots and stations, or the offices of reception and delivery—that is, from the doors of the consignors, and to the doors of con-

¹ *Camblos v. Philadelphia & Reading R. R.*, 9 Phila. 411 (1872).

² 24 Pa. 378 (1855).

signees. Companies which have made no public profession or offer to engage in the accessorial business of collecting or delivering, are not requirable to receive any freights except at their own stations, depots, or offices of reception, or to make any delivery beyond them. But a company which does engage in such accessorial business, must, in like manner as other carriers by land make deliveries at the doors of all consignees who do not dispense with such delivery.

Railroad companies cannot monopolize in whole or in part this accessorial business, or promote the monopoly of it by any one else, or appropriate preferential advantages for conducting it, to their own profit, or to that of any one else.¹

Charges for Toll and Transportation Under Early Charters.

319. Where a railroad company is authorized by its charter to charge a certain toll it may also make an additional charge for transportation. The Philadelphia & Reading Railroad Company was thus permitted to charge for transportation in addition to toll where its charter provided that the "toll on any property transported should not exceed four cents per mile, and on each passenger two cents." The court arrived at this decision from the peculiar wording of certain Acts of Assembly which showed that the legislature by the word "toll" meant a charge to be made by the railroad company to persons who transported their own goods or the goods of others over the railroad, and that it did not apply to cases where the railroad company itself transported the goods.²

¹ *Camblos v. Philadelphia & Reading R. R.*, 4 Brewster, 563 (1873).

² *Boyle v. Philadelphia & Reading R. R. Co.*, 54 Pa. 310 (1867). See, also, *Pennsylvania R. R. v. Sly*, 65 Pa. 205 (1870).

A railroad company was required to permit individuals to place cars on the road for the transportation of passengers and goods, and could take toll for freight and transportation "on all goods, produce, merchandise, and commodities transported upon the said railroad and its branches any sum not exceeding four cents per ton per mile for toll, and three cents per ton per mile for transportation." It was decided that the company could charge seven cents per mile for the goods which it carried on its own cars. The court said: "Nothing could be clearer than that there are two subjects of charge allowed to the company in this clause as against freighters in their own cars. The one is for the use of the road constructed by it and used by such freighters; the others for the use of the power necessary to move their freight over the road—the motive power. Within the purview of the section, they are as distinct as the farm is from the teams and implements of husbandry needed to cultivate it. The company has, therefore, the clear warrant of the charter for demanding the aggregate of the sums, viz.: seven cents per mile per ton for private freight in their own cars on their road. Within this limit no court can interfere with them."¹

A provision in the charter of a railroad which makes it subject to the provisions and restrictions of the Act of February 19, 1849, limits its right to charge for toll and motive power when the cars used for transportation over the road are owned or furnished by others, to two cents for each car, and three cents for each ton per mile carried, but does not limit it to freight charge if it furnish the car.²

¹ *Cumberland Valley Co.'s Ap.*, 62 Pa. 218 (1869).

² *Root & Rust v. Oil Creek & Allegheny River R. R.*, 2 Leg. Chron. Rep. 134 (1874).

The Act of May 18, 1871, relating to tolls on bridges "for every carriage, wagon, buggy, or other wheeled vehicles of whatever description," does not apply to street cars. The expression "other wheeled vehicles of whatever description," must be restricted to the same kind or class of vehicles previously enumerated.¹

If an act provides that the average charges for toll and transportation shall not exceed a certain sum per ton per mile, charges may be made at a mean rate, obtained by dividing the entire receipts for toll and transportation by the whole quantity of tonnage carried reduced to a common standard of tons moved one mile. The Act of April 8, 1826, fixed the charges for tolls and transportation on the Danville & Pottsville Railroad Company at prices varying from one and a half to four cents per ton per mile. The 3d section of the aforesaid Act of April 11, 1848 (Pamph. L. 1848, p. 541) provided "that the rates for toll and transportation may be fixed and regulated in such manner as the company may deem most advisable: Provided, however, that the maxim charges for toll and transportation on the said road shall not exceed four cents per ton per mile for freight." The 2d section of the supplement, approved April 2, 1850 (Pamph. L. 1850, p. 298) declares that the proviso to the 3d section of said act be and the same is hereby amended so as to read average charges for toll and transportation, instead of the maximum charges. Plaintiff was charged at a rate exceeding five cents per ton per mile, but the charges averaged by the whole amount of business of the company was less than four cents per ton per mile. It was held that the charges against plaintiff were not excessive. MERCUR, J., said: "The adjustment is to be made against

¹ *Mongahela Bridge Co. v. Pittsburgh & Birmingham Ry*, 114 Pa. 478 (1886).

the whole road and the entire public who use it. Full effect is therefore given to the spirit and intent of the statute, as well as to its letter, by fixing different charges per mile for different kinds of freight. Such is the custom of all railroads. Nor is there anything unjust in discriminating in favor of longer distances. The referees have found it usual for railroad companies to charge higher rates for transporting freight short than long distances, for the reason that the number of men employed, the time consumed, and the incidental expenses incurred are proportionately greater. Strong reasons exist in this case for the application of that rule. The freight of the plaintiffs was passed over one and three-fourths miles only of the defendants' road, while the motive power of the company had to be moved up a heavy grade to reach that portion of the road. The plaintiffs cannot be permitted to separate their freight entirely from that of others in determining the gross average charges received by the defendants. We therefore agree with the finding that when the rates per ton per mile are not uniform for all distances for which freights may be carried, 'average charges for toll and transportation' are understood to mean, and do mean, charges made at a mean rate, obtained by dividing the entire receipts for toll and transportation by the whole quantity of tonnage carried, reduced to a common standard of tons moved one mile. It is true that this must be applied to some given time, but the finding shows that whether each year be considered separately or the whole time together, during which the tonnage of the plaintiffs was passing over the road, the average charges of the defendants did not exceed four cents per ton per mile for the whole tonnage.¹

The charter of a railroad company authorized it to

¹ *Hersh v. Northern Central Ry.*, 74 Pa. 181 (1873).

charge certain rates of toll to others for passage over its line, but did not limit the charge for transportation by themselves. It was held that the absence of such limitation did not enable them, as common carriers, to make unreasonable charges.¹

Where one railroad company leases another with all its rights, powers, and privileges, the lessee in using the lessor's road is not subject to the charges fixed by its own charter as to toll, but to the regulations in the charter of the lessors.²

¹ *Camblos v. Philadelphia & Reading R. R.*, 4 Brewster, 563 (1873) (U. S. C. Ct.).

² *Pennsylvania R. R. v. Sly*, 65 Pa. 205 (1870).

CHAPTER XXIV.

NEGLIGENCE—GENERAL PRINCIPLES.

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|---|---------------------------------------|
| 320. Functions of Court and Jury. | 325. Mutual Negligence. |
| 321. Contributory Negligence. | 326. Negligence of Voluntary Carrier. |
| 322. Declarations. | 327. Parties. |
| 323. Conduct of Company after Accident. | 328. Practice. |
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Functions of Court and Jury.

320. Where the measure of duty is ordinary and reasonable care, and where the degree of care varies according to the circumstances, the question of negligence is for the jury; but where facts constituting negligence are either admitted or conclusively established by undisputed evidence it is the duty of the court to declare the law applicable thereto.¹

The line of demarcation between the duty of the court and of the jury should be carefully guarded. While, on the one hand, the court should not permit the jury to disregard or evade its instructions as to matters of law, it should be equally careful not to invade the province of the jury and take upon itself the determination of facts about which there is any dispute.²

If there is evidence from which the jury can properly find the question for the party on whom the burden of proof rests, it should be submitted; on the other hand, if the evidence is wholly insufficient to justify the jury

¹ *Gates v. Pennsylvania R. R.*, 154 Pa. 566 (1893).

² *Pennsylvania R. R. v. Werner*, 89 Pa. 59 (1879).

in thus finding, and the court would feel bound to set aside their verdict if they did so find, the testimony should be withdrawn from the consideration of the jury.¹

It is the duty of the court to explain to the jury what would constitute contributory negligence of the plaintiff, and then to instruct them that if they found such facts in the case, the plaintiff could not recover if the accident resulted wholly or in part from such contributory negligence. It is not enough to say, generally, to the jury that a plaintiff cannot recover if he or she has been guilty of contributory negligence. The jury must be enlightened as to what facts would constitute such negligence in view of the testimony, otherwise they have no guide by which to regulate their action, in determining the controverted facts.²

What is ordinary care, and what is negligence, are inquiries for the jury, but negligence is not to be found without evidence. There is always the presumption of innocence against it. A plaintiff, who asserts negligence must always prove it. If no such proof be adduced, the presumption of innocence remains, and it is error to submit to the jury the question whether there was negligence.³

In cases of controverted facts, the existence or non-existence of which may fairly be presumed to affect the mind in a given exigency, the question of the character of the acts whether negligent or otherwise is necessary for the jury.⁴

If, on the whole evidence in behalf of the plaintiff, his own testimony is overthrown by that of his own witnesses in such number and weight that the court could not sup-

¹ Longenecker v. Pennsylvania R. R., 105 Pa. 323 (1884).

² New York, Lake Erie & Western R. R. v. Enches, 127 Pa. 316 (1889).

³ Phila. & Read. R. R. Co. v. Hummell, 44 Pa. 375 (1863).

⁴ Pennsylvania R. R. Co. v. Ogier, 35 Pa. 60 (1860).

port the verdict in his favor, then it would become the duty of the court to direct a non-suit or a verdict; but such a case should be clear and without doubt. If there is a doubt it must go to the jury; and the remedy for the perverse verdict, or one against the weight of the evidence, is to set it aside and grant a new trial.¹

Contributory Negligence.

321. The rule that a person injured cannot recover if he has been guilty of contributory negligence, is based on the reason that one man has no right to recover from another for consequences attributable in part to his own wrong. "The law has no scales to determine in such cases where wrongdoing weighed most in the compound that occasioned the mischief."²

If negligence is proved on the part of the railroad company, it is not necessary to prove that the deceased was not guilty of contributory negligence. As the love of life and the instinct of preservation are the highest motives for care in any reasoning being, they will stand for proof of care until the contrary appears.³

In an action for personal injuries, the plaintiff, after proving affirmatively defendant's negligence, is not bound also to prove negatively that he himself was not guilty of negligence that contributed to the injury.⁴

Declarations.

322. Dying declarations as to the cause of the accident made by the person injured is not evidence in an action for negligence against the railroad.⁵ The

¹ *Kohler v. Pennsylvania R. R.*, 135 Pa. 346 (1890).

² *Catawissa R. R. Co. v. Armstrong*, 49 Pa. 186 (1865).

³ *Cleveland & Pittsburgh R. R. v. Rowan*, 66 Pa. 393 (1870).

⁴ *Bradwell v. Pittsburgh & West End Passenger Ry.*, 139 Pa. 404 (1891).

⁵ *Friedman v. R. R. Co.*, 7 Phila. 203 (1870), but see *contra* *Stein v. Railway Co.*, 10 Phila. 440 (1875).

declarations of a boy run over at a railroad crossing, made half a minute after the accident and after he had been carried to the sidewalk, are inadmissible as part of the *res gestæ*.¹

In an action against a railroad company to recover damages for the death of an employee caused by an alleged defect in a locomotive, declarations made by officers of the company, after the accident and not in contradiction to their prior testimony, are not admissible.² Where the accident was caused by a collision, declarations of a brakeman, after the accident, as to how far he had gone back to flag a coming train are not a part of the *res gestæ*.³ Declarations made by the vice-president of a railroad company after an accident are not admissible as part of the *res gestæ*.⁴

Declarations of the superintendent of a railroad company, made on the day after an accident to an employee, to the effect that the conductor, whose negligence caused the injury, had been discharged several times for intemperance and reinstated, is not admissible.⁵

The declarations of the president of a railroad company as to an accident are inadmissible if the president had no personal knowledge of the circumstances of the accident. A driver of a passenger railway company testified that he had been discharged immediately after the accident and he had seen the president of the company about it: "He asked me 'why I was discharged,' and I said 'on account of an old lady falling from my car,' and he says, 'You had better say an old lady being thrown

¹ Ogden v. Pennsylvania R. R., 1 Mona. 249 (1888).

² Erie & Wyoming Valley R. R. Co. v. Smith, 125 Pa. 259 (1889).

³ Pennsylvania R. R. v. Books, 57 Pa. 339 (1868).

⁴ Pennsylvania R. R. v. Books, 57 Pa. 339 (1868).

⁵ Huntingdon & Broad Top Mountain R. R. & Coal Co. v. Decker, 82 Pa. 119 (1876).

from your car.'” It was held that the testimony was inadmissible.¹

Declarations of an engineer made at the time of an accident at a grade crossing are properly admissible as part of the *res gestæ*.²

Declarations of a ticket agent made some days after the selling of a ticket are evidence to show that plaintiff in good faith claimed a right to ride on the ticket.³

Conduct of Company After Accident.

323. For the purpose of proving the railroad company's recognition of a duty to ring at a crossing used by the public, though not a highway, testimony that after the injury in question the engineers rang their bells is admissible.⁴

Where an accident occurred from cars striking a cart on scales near to a railroad track it is proper to admit evidence that after the accident the track was removed to a greater distance.⁵

Where an accident is caused by a narrow platform between two tracks, evidence is not improper that the next day after the accident the agent of a railroad company telegraphed to the superintendent that the platform should be removed, and that it was removed on the following day.⁶

Infants.

324. The negligence of a parent cannot to be imputed to a child.⁷ The negligence of an aunt having a child in

¹ Lombard & South Streets Pass. Ry. v. Christian, 124 Pa. 114 (1889); 95 Pa. 211.

² Hanover R. R. v. Coyle, 55 Pa. 396 (1867).

³ Van Kirk v. Pennsylvania R. R., 76 Pa. 66 (1874).

⁴ Specht v. Pennsylvania R. R., 7 Pa. C. C. R. 54 (1889).

⁵ West Chester & Philadelphia R. R. v. McElwee, 67 Pa. 311 (1871).

⁶ Pennsylvania R. R. Co. v. Henderson, 51 Pa. 315 (1865).

⁷ Erie City Pass. Ry. v. Schuster, 113 Pa. 412 (1886); Glassey v. Railway Co., 57 Pa. 172. See, also, Secs. 354, 373-377, *infra*.

charge, but without authority of its parents, cannot be imputed to the child.¹

A distinction is taken between the case of a father or mother beginning an action for the death of a child, and a child bringing an action for personal injury. In the former the contributing negligence of the parent may be used in defense, while in the latter case the negligence of an infant of tender years will not be available.²

Mutual Negligence.

325. Where a passenger on a carrier vehicle is injured by a collision, resulting from the mutual negligence of those in charge of it and another party, the carrier alone must answer for the injury.³

If a passenger on a street car is injured in a collision between a railroad train and the street car, he must show in an action against the railroad company that the injury resulted directly from the negligence of the railroad company's employees, and also that the employees of the street railway company were guilty of no negligence.⁴

Where a person is injured by the joint negligent act of a railroad company and another person or company, the person injured may elect against which of the joint tort-feasors he will proceed; but only one satisfaction can be recovered. In such a case there is no contribution among the tort-feasors.⁵

Separate suits may be brought against several defendants for a joint trespass, but if the plaintiff actually receives from one of them satisfaction for the injury sus-

¹ *Mahoney v. R. R. Co.*, 6 Phila. 242 (1867).

² *Pennsylvania Company v. James and Wife*, 32 P. F. Smith, 194 (1874).

³ *Philadelphia & Reading R. R. v. Boyer*, 97 Pa. 91 (1881); *Crossman v. Philadelphia & Reading R. R.*, 2 Chester Co. 350 (1884).

⁴ *Philadelphia & Reading R. R. v. Boyer*, 97 Pa. 91 (1881).

⁵ *North Penna. R. R. Co. v. Mahoney*, 57 Pa. 187 (1868).

tained the cause of action is discharged as to all of the defendants. Thus where a passenger is injured by a collision of two street cars belonging to different companies and receives a sum of money from the carrier company he thereby discharges from liability the other company also, notwithstanding the fact that it was the negligence of the other company which caused the accident.¹

Negligence of Voluntary Carrier.

326. In an action against a railroad company for an injury caused by the negligent conduct of the company's employees at a grade crossing, the contributory negligence of a voluntary carrier without compensation, in whose wagon the plaintiff was riding at the time of the accident, cannot be imputed to the plaintiff. In a recent case the Supreme Court carefully considered the rule laid down in *Thorogood v. Bryan*, 8 C. B. 115, and refused to apply it. CLARK, J., said: "The principal of *Thorogood v. Bryan* has been approved in some of the States, and in others it has been rejected as altogether indefensible. It has been recognized and sustained in Vermont: *Carlisle v. Sheldon*, 38 Vt. 440; in Wisconsin: *Houfe v. Fulton*, 29 Wis. 276; *Prideaux v. Mineral Pt.*, 43 Wis. 513; *Otis v. Janesville*, 47 Wis. 422; and in Iowa: *Payne v. Railroad Co.*, 39 Iowa, 523. On the other hand the doctrine has been declared unsound and untenable by the Supreme Court of the United States in the very recent case of *Little v. Hackett*, 116 U. S. 366. The doctrine has also been disapproved and rejected in New York: *Robinson v. Railroad Co.*, 66 N. Y. 11; *Dyer v. Railway Co.*, 71 N. Y. 228; *Masterson v. Railroad Co.*, 84 N. Y. 247; in New Jersey: *Bennett v. Transporta-*

¹ *Seither v. Philadelphia Traction Co.*, 125 Pa. 397 (1889).

tion Co., 36 N. J. Law (7 Vroom) 225; N. Y., etc., Ry. Co. *v.* Steinbrenner, 47 N. J. Law (18 Vroom) 161-171; in Maine: State *v.* Boston & M. R. Co., 38 Alb. L. J. 269; in Ohio: Transfer Co. *v.* Kelly, 36 Ohio, 86-91; in Illinois: Wabash, etc., Ry. Co. *v.* Shacklet, 105 Ill. 364; in Kentucky: Danville Turnpike Co. *v.* Stewart, 2 Metc. (Ky.) 119; Railroad Co. *v.* Case, 9 Bush. 728; in California: Tompkins *v.* Railroad Co., 66 Cal. 163; in New Hampshire: Noyes *v.* Town of Boscawen, 64 N. H. 361; in Minnesota: Follman *v.* City of Mankato, 35 Minn. 522; in Michigan: Cuddy *v.* Horn, 46 Mich. 596; and in Maryland: Railroad Co. *v.* Hogeland, 66 Md. 149; whilst in Pennsylvania, as we have already stated, the rule has been but partially adopted, and the reasons given by the English courts have been expressly rejected. In some of the States, as in Wisconsin, Michigan, and Iowa, a distinction would appear to have been taken between a public and a private conveyance; and, as an examination of the cases cited will show, it has been there held that when the injured person is riding in a private conveyance by invitation of the driver and without compensation, the driver will be regarded as his agent, and upon that ground the negligence of the latter is imputed to the former. In Pennsylvania, New York, Ohio, Minnesota, and other States, this doctrine of agency is expressly repudiated, and it is held that in such cases the driver's negligence cannot be so imputed. Thus it will be seen that the cases are conflicting; the rulings in England and in this country have been in the greatest confusion, which we think is attributable to the fact that the general rule of *Thorogood v. Bryan*, which for thirty-eight years was followed in England, and in parts of this country, was rested upon wholly indefensible ground. The vain effort to sustain a rule of law which was at variance with

reason and common sense has given rise to these various conflicting views and decisions.

“The English Court of Appeals, however, in a very recent case, the *Bernina*, *Armstrong v. Mills*, 12 Prob. Div. 58, decided in January, 1887, expressly overrules the case of *Thorogood v. Bryan*, and holds that one who is a passenger in a public conveyance does not identify himself with the conveyance, or the persons in charge of it, and that their negligence, direct or contributory, can in no respect be imputed to him. In the judgment of the court, Lord ESHER, M. R., after an extended review of the English and American cases, said: ‘After having thus laboriously inquired into the matter, and having considered the case of *Thorogood v. Bryan*, 8 C. B. 115, we cannot see any principle on which it can be supported; and we think that, with the exception of the weighty observation of Lord BRAMWELL, though that does not seem to be a final view, the preponderance of judicial and professional opinion in England is against it, and that the weight of judicial opinion in America is also against it. We are of opinion that the proposition maintained in it is erroneously unjust, and inconsistent with other recognized propositions of law. As to the propriety of dealing with it, at this time, in a court of appeals, it is a case which, from the time of its publication, has been constantly criticised, and no one can have gone into or have abstained from going into an omnibus, railroad, or ship, on the strength of the decision. We therefore think that, now that the question is for the first time before an English court of appeal, the case of *Thorogood v. Bryan*, 8 C. B. 115, must be overruled.’ See 57 Am. Rep. 483. In the case of *Little v. Hackett*, *supra*, in the Supreme Court of the United States, Mr. Justice FIELD, delivering the opinion, says: ‘The truth is, the

decision in *Thorogood v. Bryan* rests upon indefensible ground. The identification of the passenger with the negligent driver or the owner, without his co-operation or encouragement, is a gratuitous assumption. There is no such identity. The parties are not in the same position. The owner of a public conveyance is a carrier, and the driver or the person managing it is his servant. Neither of them is the servant of the passenger, and his asserted identity with them is contradicted by the daily experience of the world.'

"Quotations might be given from many cases in the different States, illustrating the very firm and emphatic manner in which the doctrine of this celebrated case has been denied. The authorities in England, and the great current of authorities of this country, are against it. Nor can I see why, upon any rule of public policy, a party injured by the concurrent and contributory negligence of two persons, one of them, his common carrier, should be held, and the other released from liability. As to this, I speak only for myself. In my opinion there is no principle consonant with common sense, common honesty, or public policy which should hold one not guilty of any negligence, either of omission or commission, for the negligence of another, imputed to him under such circumstances. Although in *Carlisle v. Brisbane*, I may appear to have accepted that doctrine, I meant merely to state that the ground upon which this court had rested this rule was better than that taken by the English courts.

"But if this were not so, *Fields* was not a common carrier. *Dean* was riding in the wagon merely by invitation of *Fields*, who happened to be going in the direction of *Dean's* home with a load of provisions. He was carried without compensation, merely as an act of kindness on

the part of Fields, who had sole control of the team and of the wagon. The case is similar in this respect to *Carlisle v. Brisbane*, *supra*, and to the case of *Follman v. City of Mankato*, 35 Minn. 522. We are clearly of opinion that if Dean himself was guilty of no negligence, the negligence of Fields cannot be imputed to him; but it is in this respect this case differs from *Carlisle v. Brisbane*. In the case just cited, *Brisbane* was a stranger; the accident occurred after night and after a fresh fall of snow; it was caused from a defect in the street. There was no evidence, whatever, that *Brisbane* knew that *Cornman* was a reckless or unskillful driver, or that he (*Brisbane*) saw, or, by the exercise of reasonable care at the time, could see, or ought to have seen, the dangerous condition of the street; indeed, the jury found that he was not personally aware of either, and no question was raised involving that view of the case. Here, however, the facts are of different character. *Dean* knew the locality well; he had crossed the tracks frequently at this point; he knew that a train was due about that time; and that he was approaching the railroad at a fast trot; yet he took no precautions. He was certainly responsible for his own negligence; he sat with his back to the driver, and, although he might have seen his danger, he confesses that he did not look. He said nothing by way of warning to *Fields*, nor did he ask him to stop, to look, and listen, or to permit him (*Dean*) to get out; and the danger was as obvious to *Dean* as it was to *Fields*. The testimony is wholly to the effect that the plaintiff committed himself voluntarily in the action of *Fields*; that he joined him in testing the danger, and he is responsible for his own act. The case is ruled by *Crescent Township v. Anderson*, 114 Pa. 643."¹

¹ *Dean v. Pennsylvania R. R.*, 129 Pa. 514 (1889).

Parties.

327. An accident by which plaintiff's intestate lost his life occurred in the yard of the Northern Central Railway Company, at Marysville, upon the track of the said company, and from one of its shifting engines. An action was brought against the Pennsylvania Railroad Company by the widow of Sellers to recover compensation for his death upon the ground that it was caused by the negligence of the last-named company. There was no evidence that said company was either owner or lessee of the Northern Central Railway. There was some evidence tending to show that the Northern Central was operated by the Pennsylvania Railroad Company. It was not very strong or satisfactory, but was as much so as the evidence in *Penna. R. R. Co. v. Spicker*, 105 Pa. 142, and *Young v. Railroad Co.*, 115 Pa. 112, in which cases substantially the same question was considered. It was held that the action could be sustained.¹

Where a main trunk railway company furnished the motive power, engineers, and conductors to transport the cars of another intersecting railway company on its road, it is responsible for an injury done to a brakeman employed by and on the cars of the intersecting company, through the negligence of the engineer.²

Practice.

328. The joinder to one declaration of counts for injuring the plaintiff by a train at a railroad crossing and for killing his child at the same time, though improper, is not ground for arresting a judgment for the plaintiff when all evidence as to the child and the consideration of the counts relating to it were excluded from the trial.³

¹ *Pennsylvania R. R. v. Sellers*, 127 Pa. 406 (1889).

² *Smith v. Northern Central Ry.*, 1 Pearson, 243 (1861).

³ *Specht v. Pennsylvania R. R.*, 7 Pa. C. C. R. 54 (1889).

A claim for damages for the death of a minor son and for the killing of a horse may be joined in the same action.¹

Trespass *vi et armis* will not lie against a railroad company for the wrongful act of a conductor in ejecting a passenger.²

If improper evidence is given tending to influence the damages, and it is not struck out at or before the close of the testimony, so that counsel shall not be allowed to refer to or dwell upon it in their address to the jury, it is too late to cure the mistake by directing the jury to disregard it in the charge.³

The jury cannot allow interest from the date of an accidental injury to the time of trial upon the amount of damages which they find for plaintiff.⁴

¹ Pennsylvania R. R. v. Bock, 93 Pa. 427 (1880).

² Allegheny R. R. v. McLain, 91 Pa. 442 (1880).

³ Pennsylvania R. R. v. Butler, 57 Pa. 335 (1868).

⁴ Pittsburgh Southern Ry. v. Taylor, 104 Pa. 306 (1883).

CHAPTER XXV.

NEGLIGENCE—DAMAGES FOR PERSONAL INJURIES.

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| 329. Measure of Damages for Personal Injuries. | 333. Loss of Minor's Services. |
| 330. Loss of Earning Power. | 334. Exemplary Damages. |
| 331. Fright Unaccompanied by Physical Injury. | 335. Instructions as to Damages. |
| 332. Examination of Injured Person by Inspection. | 336. Release of Damages. |
| | 337. Statute of Limitations. |

Measure of Damages for Personal Injuries.

329. Pain and personal suffering are of a pecuniary value, and may be considered by the jury in estimating damages for personal injury. "What is the pecuniary worth of pain? If it must be determined, it is either nothing, or it is variable, according to the conjecture of those who are required to estimate it, and they must guess not only its intensity, but its value in dollars and cents. It would seem that judicial tribunals ought not to be under the necessity of deciding anything so interminable. Damages, if recoverable at all, ought to be such as can be measured by some comprehensible rule, some rule that can be applied to human affairs. Notwithstanding all this, however, it is undoubtedly true, that in some actions for personal injuries, juries in estimating the damages are to take into consideration the personal suffering caused by the wrong. So are the decisions. In cases of libel or slander, of willful torts to the person, and in cases of negligence, other than those which are breaches of contract,

in cases of negligence, which causes a personal injury, it has often been held that a jury may take into consideration the bodily and mental pain attendant on the injury. It must be admitted that it is no more possible to determine the pecuniary value of pain, in this class of cases, than in such a one as we now have before us. But such actions are not remedies sought for broken contracts. The wrongs complained of bear a nearer resemblance to a public offense. In assessing damages in such actions, juries are always allowed a larger license than in actions on contracts, and with some reason. In this State, at least, it seems to be the doctrine, that the circumstances attending such injuries may warrant an assessment of damages beyond those that are merely compensatory. It might well be, therefore, that a different rule should be applied to them from that which should be applied in suits on broken contracts.

“Yet it is not to be denied that the authorities recognize no such difference. In this State the question has never directly arisen; but I know of no decision anywhere that a passenger personally injured by the neglect of a carrier to transport him safely, has been denied compensation for the pain caused by the injury. Such compensation is denied to one who sues for an injury to his relative rights; but the immediate sufferer has been held entitled to it whenever the question has been raised.”¹

If a plaintiff, in an accident case, shows the character of the injuries sustained and his earning capacity, he has made out a *prima facie* case, and it is not necessary for him to anticipate the defense by going into the minutiae of the injury. If the defendant alleges that the injuries are not as serious as claimed, and offer evidence to that

¹ Pennsylvania R. R. Co. v. Allen, 53 Pa. 276 (1866); Pittsburgh, Allegheny & Manchester Pass. Ry. v. Donahue, 70 Pa. 119 (1871).

effect, the plaintiff may in rebuttal show the extent of the injuries, and their permanent character.¹

A verdict of \$2,500 for loss of a leg is not inadequate, and a new trial will not be granted on account of the insufficiency of the damages.²

Fifteen thousand dollars is not excessive compensation by way of damages to a grocer, forty-two years old with a business of \$3,000 or \$4,000 a year, for the fracturing of his right leg, resulting in amputation at the knee; his right arm, causing permanent injury, and three ribs, producing pleurisy.³

Loss of Earning Power.

330. Loss of earning power is an element of damages; but the loss of income, and of possible profits in a special contract, cannot be regarded as a legitimate basis of recovery.⁴

A woman who keeps a boarding-house may show that on account of the disability caused by her injury she has been rendered incapable of carrying on the business of keeping a boarding-house. Such evidence is not intended to show a loss of the profits, but a loss of earning power in a business or occupation.⁵

Evidence of the annual amount of a peddler's sales and profits is admissible as tending to show the amount he might have earned, if he had been able to attend to his business.⁶

In an action for damages for personal injuries it is not proper to admit evidence of the number of plaintiff's

¹ *Pennsylvania R. R. v. Fuller*, 3 *Pennypacker*, 176 (1883).

² *Evans v. Delaware & Hudson Canal Co.*, 6 *Kulp*, 465 (1892).

³ *Specht v. Pennsylvania R. R.*, 7 *Pa. C. C. R.* 54 (1889).

⁴ *People's Passenger Ry. v. Lauderbach*, 4 *Pennypacker*, 406 (1884).

⁵ *Malone v. Pittsburgh & Lake Erie R. R.*, 152 *Pa.* 390 (1893).

⁶ *Hanover R. R. v. Coyle*, 55 *Pa.* 396 (1867).

family, and his habits, industry, and economy as affecting the question of damages.¹

Fright Unaccompanied by Physical Injury.

331. Mere fright, when unaccompanied by injury to the person, is not actionable.

Plaintiff alleged in her statement of claim that, by a collision on defendant's railroad resulting from the negligence of its employees, cars were derailed and thrown against her dwelling, subjecting her to fright and to nervous excitement permanently weakening and disabling her. It was held that the statement showed no cause of action. The court said: "We know of no well-considered case in which it has been held that mere fright, when unaccompanied by some injury to the person, has been held actionable. On the contrary, the authorities, so far as they exist, are the other way. Mr. Wood fairly states the rule in his note to Mayne on Damages, at page 74: 'So far as I have been able to ascertain, the force of the rule is that the mental suffering referred to is that which grows out of the sense of peril, or the mental agony at the time of the happening of the accident, and that which is incident to and blended with the bodily pain incident to the injury, and the apprehension and anxiety thereby induced. In no case has it ever been held that mental anguish alone, unaccompanied by an injury to the person, afforded a ground of action.' In *Wyman v. Leavitt*, 71 Me. 227, a contractor of a railroad was blasting rocks within the right of way of the road. The blast blew rocks upon the plaintiff's land, and, in addition to the damage to the land, plaintiff claimed damages for fright caused by apprehension of personal injury. Held,

¹ *Pennsylvania R. R. v. Books*, 57 Pa. 339 (1868); *Laing v. Colder*, 8 Pa. 479 (1848).

that he could not recover. Our own recent case of *Fox v. Borkey*, 126 Pa. 164, was a case of fright from blasting, and it was said by our brother MITCHELL: 'The injury was not the natural or proximate result of the act complained of.' In *Lynch v. Knight*, 9 H. L. 577, Lord WENSLEYDALE said: 'Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone.' To the same point are *Indianapolis Ry. Co. v. Stables*, 62 Ill. 313; *Canning v. Williamstown*, 1 Cush. 451; *Johnson v. Wells*, 6 Nev. 224."¹

Examination of Injured Person by Inspection.

332. Where plaintiff claims damages by reason of alleged spinal injury received through the negligence of defendant, such injuries being latent in their nature, the court will, on application of defendant, order plaintiff to submit to examination by inspection, etc., by medical experts produced on part of defendant. GUNNISON, P. J., said: "There appears to be no reported cases in Pennsylvania in which, in an action for personal injury, the question involved has been ruled upon. The right to indirectly compel a party to produce for inspection writings which the adverse party conceives to be material for him, by continuing the trial until the inspection is allowed, has been affirmed in several cases: *Hurst v. Hurst*, 3 Dallas, 512; *Goldey v. George*, cited in 1 T. & H. Pr. 362. And courts generally exercise the power of directing the production of such documents for inspection, in some cases upon statutory authority, in others as an exercise of equitable power inherent in courts, incidental to their power to regulate practice, and necessary

¹ *Ewing v. Pittsburgh, Cincinnati, Chicago & St. Louis Ry.*, 147 Pa. 40 (1892).

to the proper administration of justice. The application in the present case is fair and reasonable.

"To grant the order prayed for is but to apply the principle of allowing the inspection of writings, fully recognized in this State, to another species of evidence. The allegation of the plaintiff is that he has sustained permanent injuries to the spine. Such injuries are latent, and can only be verified or disproved by means of an examination by experts skilled in human anatomy and in medical science. It is not like the case of the loss of a limb, which is apparent, and can be seen by the jury at the trial. Without an examination by experts, the defendant may not be able to successfully defend a case in which the plaintiff simulates an existing weakness or injury, and thus be at the mercy of an unprincipled adventurer whose claim has no merit.

"The object of a trial in court is that substantial justice may be done between the litigants. If a defendant is denied the reasonable opportunity of testing the truth of the plaintiff's allegations, who alleges an injury which can only be discovered upon an examination by experts, courts of justice may be applied to and relied upon to assist in fraudulent and unjust recoveries upon the testimony of plaintiffs and of witnesses of their own selection, whose only knowledge may be derived from declarations made by the plaintiff for the purpose of manufacturing evidence in their own favor. Impartial justice could not be expected in such cases at the hands of juries, who are not permitted to know the truth, and whose sympathies were aroused by the recitations of sufferings which could not be controverted. To permit such a practice would be to encourage perjury and properly subject courts of justice to public contempt.

"On the other hand, if the plaintiff's claim is meritorious, if he has sustained the injuries he complains of, he has nothing to fear from the most searching examinations. His case will only be strengthened by it. I do not mean to intimate an opinion as to the merits of this case. My remarks are of general, and not particular, application.

"While the power to compel a plaintiff to submit to an examination has been denied by some courts, the better opinion seems to be that it exists, and should be exercised in proper cases. Indeed, compliance with such an order has sometimes been enforced by dismissing the plaintiff's case entirely, upon his refusal to comply, and it has been said that the refusal is a contempt of court, of the same nature as the refusal of a witness to answer upon the stand, and may subject the plaintiff to punishment as for contempt. It is not necessary to resort to such extreme measures, however. It is sufficient, to insure that justice be done, that the court refuse to try the cause until a compliance is had with the order.

"The doctrine is ably discussed and well laid down in Thompson on Trial, sec. 859, citing *White v. Milwaukee*, etc., R. R. Co., 61 Wis. 536; *Walsh v. Sayre*, 52 How. Pr. 334; *Shepard v. Mo. P. Ry. Co.*, 85 Mo. 629; s. c. 55 Am. R. 390; *Schroeder v. Ry. Co.*, 47 Iowa, 375; *Turnpike Co. v. Baily*, 37 Ohio St. 104; *Atchison*, etc., R. R. Co. v. Thul, 29 Kan. 466; s. c. 10 Am. & Eng. R. R. Cas. 783; *Hatfield v. St. Paul & D. R. R. Co.*, 18 Am. & Eng. R. R. Cas. 292 and note.

"These authorities, in the absence of decisions to the contrary in this commonwealth, are convincing, and in accordance with the enlightened modern ideas of the fair and impartial administration of justice.

"The examination should, however, be conducted in

such a manner as to avoid the infliction of pain, the subjection to indignity, or the endangering of health or life. No anæsthetics, opiates, or drugs should be administered. To interrogate the plaintiff as to his condition, the nature of this injury, or the manner in which it was sustained, thus, perhaps, eliciting declarations from him which may be used in evidence against him, would be highly improper, when the circumstances necessarily attending the examination are considered.

"To insure perfect fairness, the examination should be regulated by the order of the court, and should strictly conform thereto."¹

Loss of Minor's Services.

333. A father suing for an injury to a minor son can only recover the value of the child's services and the expenses of nursing and curing him.

In *Pennsylvania R. R. Co. v. Kelly*,² the jury returned a verdict in favor of the father for \$3,000. The court reversed the judgment entered on the verdict, **WOODWARD, J.**, saying: "A verdict for \$3,000 for the loss of a son's services is not to be found in the old law, and if there are any such instances in modern times they are comparatively rare. The most recent assessments in England are very much below this rate of compensation. The courts labor to define the measure of damages with all possible precision, but the application of it must be left to the jury, and unless they are restrained by a firm exercise of the power of new trials damages will go on increasing, each instance of excess being used to justify the next, until the pecuniary loss of the one party will be repaired at the ruin of the other.

¹ *Hess v. Lake Shore & Michigan Southern R. R.*, 7 Pa. C. C. R. 565 (1890).

² 31 Pa. 372 (1858).

"Where there has been no oppression, fraud, wantonness, or other circumstances to call for exemplary damages these large verdicts are a violation of the rule of compensation, and a violation that is just as unpardonable when practiced against a corporation as against an individual. If any person should wantonly crush the foot of a little boy I can scarcely conceive of a rate of damages that I would deem too high. But when such a disaster occurs from a merely negligent performance of customary duties, and involves no malicious motive whatever, the rule of law is that the father is entitled to compensation merely for the pecuniary loss he has sustained. Not compensation for his lacerated feelings or his disappointed hopes, for the law cannot compensate these in money, but pecuniary indemnity for pecuniary losses. What he spent to cure his boy, and what profit might have accrued to him from his services, more than can be realized after the injury, are the proper elements of a verdict, and they are to be rated none the higher or lower because the defendant happens to be a corporation instead of a natural person."

Compensation for minor's injuries is for loss of services by father, for nursing and surgical and medical attendance.¹

A mother cannot recover damages for an injury to her minor child. In a case where a minor was injured while alighting from a street car, it appeared that the minor lived with his mother, his father being dead, and contributed to her support. The mother provided him with medical attendance and nursed and supported him during his illness. The court held that the contract to carry safely was with the minor and that his mother could not recover for the injury.²

¹ *Oakland Ry. Co. v. Fielding*, 48 Pa. 320 (1864).

² *Fairmount & Arch Street Pass. Ry. Co. v. Stutler*, 54 Pa. 375 (1867).

Exemplary Damages.

334. The liability of railway and other corporations to exemplary damages for gross negligence is well settled. The general rule in cases of negligence is that only compensatory damages can be given. Juries are not at liberty to go farther than compensation, unless the injury was done willfully or was the result of that reckless indifference to the rights of others which is equivalent to a violation of them. There must be willful misconduct, or that entire want of care which would raise a presumption of conscious indifference to consequences: *Milwaukee & St. P. Ry. Co. v. Armes*, 91 U. S. 489. The corporation is liable for exemplary damages for the act of its servant, done within the scope of his authority, under circumstances which would give such right to the plaintiff as against the servant were the suit against him instead of the corporation.¹

In actions against railroad companies for injuries received through the negligence of their servants, exemplary damages may be recovered when the injuries are wanton and malicious, or are inflicted in a gross or outrageous manner, whether the act was previously authorized or subsequently ratified by the corporation or not.²

Exemplary damages are allowed only where the act complained of has been committed willfully and maliciously, or in the absence of actual malice, where it has been committed under circumstances of violence, oppression, outrage, or wanton recklessness. When there is no evidence which would fairly justify a jury in finding that the wrongful act was of the general character stated, the

¹ *Lake Shore & Michigan Southern Ry. v. Rosenzweig*, 113 Pa. 519 (1886).

² *Lake Shore & Michigan Southern R. R. v. Rosenzweig*, 113 Pa. 519 (1886); *Philadelphia Traction Co. v. Orbann*, 119 Pa. 37 (1888).

question of exemplary damages should not be submitted to the jury; in the absence of proof of these circumstances of aggravation, compensation merely is the rule.

A newsboy who was permitted to sell papers on a street car was standing on the lower step of the car when approaching a crossing at which were passengers who wished to enter the car. The conductor pushed the boy on the arm, and he fell under a passing wagon and was injured. It did not appear whether the push was a gentle or violent one, or whether it was given in anger or merely as a suggestion that the lad should make way for the passengers. It was held that there was no sufficient evidence of wantonness on the part of the conductor to justify an award of exemplary damages.¹

Instructions as to Damages.

335. Where, in an action for personal injuries, defendant, a railroad company, introduces a large amount of testimony which tends to show that plaintiff was suffering from lumbago of long standing, and that this disease was the cause of his ill-health and not the injury alleged to have been suffered on defendant's train, it is error for the court to entirely refrain from alluding to such testimony in its charge.²

In an action for personal injuries it is improper for the court to suggest the price in money sufficient to induce a person to undergo voluntarily the pain and suffering for which a recovery is sought. The true rule is that, in addition to loss of time and expenses actually incurred, the jury may consider also the nature of the injury, and the pain and inconvenience resulting from it, and make such

¹ Philadelphia Traction Co. v. Orbann, 119 Pa. 37 (1888).

² Herstine v. Lehigh Valley R. R., 151 Pa. 244 (1892).

allowance therefor as, in view of all the attending circumstances, may seem to be just and reasonable.¹

In an action by a boy of ten years old to recover damages for personal injuries, it is not improper to charge the jury that if they are satisfied that the injury was of a permanent nature, they could consider that in arriving at what they might think to be a fair and just compensation.²

Release of Damages.

336. Where a person signs a release of damages for the killing of his son, and subsequently brings an action against the railroad company, alleging that there was fraud in the procuring of the release, there must be more than a mere scintilla of evidence showing fraud. The evidence of fraud must be clear, precise, and indubitable, otherwise it should be withdrawn from the jury. Thus where a plaintiff testified that he could not read nor write, but signed the release without asking to have it read or explained to him, and there was no other evidence tending to show fraud, the case was withdrawn from the jury.³

Statute of Limitations.

337. A person may bring an action for damages for personal injuries although more than six years has expired from the time of the accident, if at that time he was a minor. Thus in action of trespass in the case for personal injuries brought in April, 1884, it appeared that the accident occurred in June, 1874. The defendant pleaded the statute of limitations. Plaintiff replied that

¹ *Baker v. Pennsylvania Co.*, 142 Pa. 503 (1891).

² *Wilson v. Pennsylvania R. R.*, 132 Pa. 27 (1890).

³ *Pennsylvania R. R. Co. v. Shay*, 82 Pa. 198 (1876).

at the time the cause of action accrued he was a minor, and that the action was brought within six years after he attained his majority. To this replication the defendant demurred on the ground that the cause of action was not embraced within the proviso of the Act of March 27, 1713, § 3. The court overruled the demurrer.¹

¹ *Hasson v. Pennsylvania R. R. Co.*, 1 Pa. C. C. R. 531.

CHAPTER XXVI.

NEGLIGENCE—DEATH.

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| 338. Constitutional Provision Relating to Accidental Death. | 343. Death of Infant. |
| 339. Measure of Damages. | 344. Parties. |
| 340. Death of Husband. | 345. Death Caused by Negligent Act in Another State. |
| 341. Death of Wife. | 346. Evidence. |
| 342. Death of Son over Twenty-one Years of Age. | |

Constitutional Provision Relating to Accidental Death.

338. Section 21 of art. III of the Constitution is as follows: "No act of the General Assembly shall limit the amount to be recovered for injuries resulting in death, or for injuries to person or property, and in case of death from such injuries, the right of action shall survive, and the General Assembly shall prescribe for whose benefit such actions shall be prosecuted. No act shall prescribe any limitation of time within which suits shall be brought against corporations for injuries to person or property, or for other causes, different from those fixed by general laws regulating actions against natural persons, and such acts now existing are avoided."

This clause of the Constitution first came up for consideration, in connection with the Act of 1868, in *Pennsylvania Railroad Company v. Langdon*.¹ It was there held, Mr. Justice TRUNKEY dissenting, that the Act of

¹92 Pa. 21.

1868 was not avoided by the above recited clause in the Constitution. It was followed by *Lewis v. Hollahan*,¹ where it was said by Mr. Justice STERRETT: "The case of *Pennsylvania Railroad Company v. Langdon*, cited and relied on by the plaintiff in error, was well decided on other controlling questions, but we do not see our way clear to follow it as authority on the precise constitutional question involved in this case. One of the questions in that case was as to the acceptance by the company of the Act of 1868. In this case the question does not arise." There was no dissent in that case. In a subsequent case, *Philadelphia, Wilmington & Baltimore Railroad Company v. Conway*,² there was an attempt to raise the same question on the part of the above-named railroad company. There was no proof on the trial below that the company had accepted the provisions of the Act of 1868, and that case was decided upon other grounds. In delivering the opinion of the court PAXSON, J., said: "It may not be out of place just here to correct a misapprehension of the learned judge below in regard to *Railroad v. Langdon*. That case has not been overruled, as he supposes. Some of the reasoning by which it was supported is not sustained by the late case of *Lewis v. Hollahan*, and as my brethren are wiser than myself, I cheerfully submit to their views. Moreover, if, when the main question comes up again, *Railroad Company v. Langdon* shall be found to be a mistake, it will afford me pleasure to join in overruling it." In *Pennsylvania Railroad Company v. Bowers*,³ the court overruled *Pennsylvania Railroad Company v. Langdon*, PAXSON, C. J., saying: "The right to recover damages for acts of negligence resulting

¹103 Pa. 425 (1883).

²112 Pa. 511.

³124 Pa. 183 (1889). See *Kashner v. Lehigh Valley R. R.*, 1 Northampton Rep. 332 (1884); *Jacobs v. Pennsylvania R. R.*, 6 Pa. C. C. R. 60 (1888).

in death did not exist at common law. It was conferred by the legislature, and the authority which gave it can give it away. It follows that it may limit it. The right of the legislature to barter away this right to a corporation, or to limit it, so as to make it a binding contract beyond the reach or power of subsequent legislatures, may well be doubted. It was within the power of the legislature at any time to have repealed the Act of 1868. It follows that it came within the power of constitutional repeal, and we are all of opinion that the provisions referred to of said act are avoided by the present Constitution. I make no apology for my change of views. Had I adhered to those formerly expressed there might have been occasion for one."

Measure of Damages.

339. Damages for the death of a person caused by the negligent act of another must be estimated on the basis of a money value for the life of the person killed to the persons to whom the right of action is given, and the jury can consider the probable accumulations of a man of the age, habits, health, and pursuits of the deceased in reaching their conclusions.

In *Penna. R. R. Co. v. McCloskey's Admr.*,¹ LOWRIE, J., in construing the Act of April 15, 1851, which then came for the first time before the court, said: "Heretofore, no action has been allowed among us for the death of a freeman, and the novelty of the case contributes to the difficulty of determining it, and warns us to proceed with appropriate caution. But strange as the case is in our jurisprudence, we are not without analogies here and elsewhere which may furnish us some light.

"The principle that requires compensation for the death of a freeman is not at all new in history. It was

¹ 23 Pa. 526 (1854).

long an institution among our Anglo-Saxon ancestors; and perhaps it was never positively abolished, but rather died out under the influence of the Norman conquest, and the centralizing powers of the king's courts which treated all such wrongs as wrongs done to the king—and hence as criminal offenses. It seems to have been an institution common to all Germanic nations, and perhaps to every people that rose one degree above the savage life and were still striving to rise. With them it was intended as a compensation to surviving kindred, and as a means of preventing the disorders that follow in the train of private revenge.

“There are indications of its existence among the Romans (Dig. 9, 2, 7, 4, also 9, 2, 9, and 31), though Pasquier (*Inst. de Just.* 4, 3) expresses doubts about it. Voet (*Pandects*, 9, 2, 11) and Pacius (*Analysis Institutionum*, 4, 3, 1) refers to it as existing there, and also in Holland, the Netherlands, and perhaps in some other parts of modern Europe, and we have evidence of its existence in Scotland: *Erskin's Inst.* 592, n. 13; *Bell's Principles of Law*, 749; 10 *Eng. L. & Eq. R.* 437. As it existed among the Romans, the damages recovered by the kindred were not by way of hereditary succession; for damages for wrongs done to the body of a freeman were not allowed to pass in that way: Dig. 9, 3, 5, 5; *Pothier's Pond*, 9, 3, 12.

“A recent English statute, 9 & 10 Vict. c. 93, seems to have revived the principle of the old Saxon law, and to allow the relations of the deceased to recover damages to be apportioned among them according to the injury resulting to them respectively. In form, therefore, the action is for their own loss, and not a survival of the right of action for the injury to the deceased. Yet the English courts have not known how to estimate the dam-

ages, except according to the value of the life lost: 10 Eng. L. & Eq. Rep. 437; *Armstrong v. S. E. Railway Co.*, 11 Jurist, 758; 6 Harr. Dig. 274; and this statute seems to leave other injuries to the person just as they were before, and, consequently, a death from another cause, before compensation recovered, is not provided for.

“But it is asked, how can one that is dead be compensated by civil procedure, for injuries done to him in his life, and especially for the loss of his life? This directs us to another aspect of the present claim that is not as new as the one already noticed.

“In the early stages of our law all rights of actions for wrongs done, not breaches of contract, died with the injured person. This, however, was altered by statute 4 Ed. 3, c. 7, and this alteration has been very largely extended by construction; and by our statute, 24th February, 1834, s. 28, nothing was excepted but slander, libel, and wrongs to the person. Many of the cases thus declared to survive involve questions of compensation, and exemplary damages for wrongs and insult, fraud and malice, which are to be decided upon, and executed after the injured party is beyond the reach of civil compensation, and yet the injury is measured just as if he were still living.

“There are abundant indications of the same law of survivorship in the Roman law in regard to such injuries: Inst. 4, 12, 1; Dig. 44, 7, 26, and 58; Dig. 50, 17, 139, and 164; Heineccius *Elementa Juris.*, ss. 1193, 1194; Pacius, *Analysis Inst.* 4, 12; and these embrace a wider range of injuries than have been heretofore saved from death by our law; for they included all cases actually commenced in the lifetime of the injured party, and prevent their abatement by his death.

“Our Act of April 15, 1851, seems to express its

purpose better than the English one heretofore referred to; for in one section it simply provided that the action commenced for injuries to the person shall not abate by the plaintiff's death, but shall survive by substitution of his personal representatives; and in another, that if no suit for damages be brought during life by the party mortally injured, by negligence or violence, then the widow, and if there be no widow, the personal representatives, may maintain an action for damages for the death.

"The first of these sections is very plain, and it provides that the personal representatives may continue the action commenced—that is, may proceed and recover the very damages to which the deceased would have been entitled had he survived until verdict and judgment.

"The other section is somewhat less definite in regard to the damages intended; but this very indefiniteness is proof that no other thought was in the mind of the legislature than the wrong and damage done to the decedent; else it would have been made to appear. If one section related to damages done to the deceased, and the other to damages done to his relatives, these contrasted thoughts could hardly have failed to come out clearly in the expression.

"But even if this were otherwise, we do not perceive how it could influence the damages; for they must necessarily be measured by the absolute value of the life lost, and not by the pecuniary loss which the designated representatives shall have thereby sustained. The precept involved in the law is, 'Thou shalt not by negligence or violence take away the life of another;' and the sanction of the law lies in the duty of the compensation for the life destroyed, measured according to the necessities and circumstances of his kindred. It is very hard to value;

but not for that, more uncertain than the speculations in relation to damages which are proposed in its stead.

"This thought is involved in the whole course of the legislation and jurisprudence referred to, and it is a rejection of the idea that the negligence which destroys life is irresponsible, and an assertion of the principle that all negligence must answer for its result, however serious. We have not heretofore been startled at the absurdity of giving a pecuniary compensation for broken limbs, or ruined health, or shattered intellect, or tarnished reputation.

"If the body be all crushed we have regarded its sufferings as a subject of civil compensation so long as life smolders beneath the ruins, even though there be no capacity to appreciate or enjoy compensation. We ought not to be startled that the duty of compensation is continued when such life is smothered out.

"We call it compensation, while we admit that money is a very insufficient and uncertain measure of all such injuries. But it is the best standard we have, and in practice it is not found to be absurd. The duty of the wrong-doer to make compensation is very plain, and such as he has, which the law can reach, it compels him to give, though it may never reach the consciousness of the person injured. It is an act of distributive justice in vindication of invaded right, and it adopts the best approximation to compensation which the authority of the law can enforce. And in these times, when criminal justice presents so many symptoms of going out of repute, and police officers are so often held up to public indignation for their performance of duty, it is found to operate well. Call it punitive; yet it is only indirectly so, as all compensation is, and does not wipe out any offense that is involved against the State. From our

present experience and observation, therefore, we are unable to discover any substantial error in the instructions complained of. It would be wrong to limit the value of a man's life by his probable accumulations, for many men may make none in a lifetime, and many have arrived at an age when they no longer attempt to make any, and many women never make any, and yet every one is entitled to his life, and we have as yet discovered no standard for its valuation. It is not human possessions that are destroyed, but humanity itself, and as this has no market value it must necessarily be very much a matter of human feeling.

"Hard, then, as the task may be, and however uncertain its results, it is to be performed by the jury, aided by the cautions and counsels of the judge, who has been trained in the consideration of the judicial question. Looking, on the one hand, to the dignity of human nature, as it has been assailed, and, on the other, to the position and rights of the defendant, and considering the dignity of their positions as judges of most sacred right, and their own dignity and responsibility as individuals, and loving mercy even while doing justice, the jury must place a money value upon the life of a fellow-being, very much as they would upon his health or reputation. The law can furnish no definite measure for damages that are essentially indefinite."

In the case of death the damages are to be confined to injuries of which a pecuniary estimate can be made, and the jury cannot take into consideration the mental suffering occasioned to the survivors by the death, nor can the sufferings of the injured party be considered. In *Penna. R. R. Co. v. Zele*,¹ THOMPSON, J., said: "The case of the Pennsylvania Railroad Company *v. McCloskey's Admin-*

¹ 33 Pa. 318, 329 (1858).

istrator, 11 Harris, 526, while it adheres to the rule of giving damages only upon such bases as are susceptible of a pecuniary estimate, seems to regard the value of the life lost as the basis of the estimate, rather than the injury resulting from it to the survivor entitled to sue. This conclusion flowed from the form of, and parties to, the action, and naturally led to the result. It was a suit by the personal representatives, for the benefit of the estate. Treated in this light, and as the plaintiffs, the administrators, were not damaged by the death, but were recovering for the estate, the only estimate, it seems to me, that could be made was of the value of the life. The wrong done to it survived by virtue of the statute to the estate, and gave the personal representatives their right of recovery co-extensively with its value. But for some reason—a wise one of course—this law was in 1858 altered, and the right to sue was conferred on parents for the loss of children, and the children for parents, and reciprocally between husband and wife. This was a new and independent right given by positive law—not cast upon them by survivorship as for an injury to the decedent. It is for the wrong done to them. In this view of the law, we think the rule which should have been observed in this case differs from that in the *Pennsylvania Railroad Company v. McCloskey's Administrator*, and more resembles the case of a father suing for injury to his child. In the case of the *Pennsylvania Railroad Company v. Kelly*, 7 Casey, 372, the rule of damages in such a case was considered, and in delivering the opinion of the court, Mr. Justice WOODWARD says: 'The damages must be compensatory merely, and that compensation must have regard to the plaintiff's loss of his services, and to the expense of nursing and medical treatment.' 'The father was entitled to the services of his child during minority,

and by just so much as this injury impaired the value of this right was he entitled to compensatory damages,' and it was added, 'that it was proper for the jury to understand that the suffering endured by the boy, and the disfiguration of his form, and whatever was merely personal to him, should not enter into the father's damages, because for them the son would have a right of action.' This is a rule of damage on a very kindred subject, and is scarcely distinguishable from cases like the present, except in extent of injury, and is, in essence, the principle of the cases already cited.

"From the authorities and reasons given, the jury, instead of the unrestrained license given them in the charge, in the assessment of damages, should have been instructed that, if the plaintiff were entitled to recover, it was for the damage done in producing the death of the son, and that this was to be estimated by the pecuniary value to them of his services during his minority, together with expense of care and attention to the deceased arising out of the injury, funeral expenses, and medical services, if any. This is the only pecuniary damage done to them, and this the law allows them to recover, if entitled on the facts to recover at all. This excludes damages for the suffering of the deceased, which was personal to himself, and did not survive, as well as for solace, which are incapable of appreciation so as to be compensated. No money could be the measure of the affliction. No road, great or small, but would fall beneath the weight of such a rule, if applied; and for an injury happening from a mere oversight, amounting, of course, to negligence by some agent in the transit of the cars, it would be a severe penalty to visit the company with extravagant and exterminating damages. But they should be held to a strict accountability to the extent that a fair interpretation of

the statute will allow. In making the estimate of the value of the life and consequent damage by the death, much is still left to the sound discretion of the jury. Whatever is susceptible of a pecuniary estimate is included within it, and what we have seen was not to be included, must be excluded.

“We are speaking only of cases of death by negligence, unaccompanied by wantonness, violence, or gross negligence evincive of moral turpitude. In such cases, no doubt, but merely compensatory damages may be exceeded. It is not intended to vary the rule on this subject existing in case of other personal wrongs, but leave it with such attendant circumstances to the sound discretion of courts and juries.”

The evidence need not show the precise amount of the damages in dollars and cents, but it must clearly show that the plaintiff did actually sustain pecuniary damages or loss. “Life, by law, had a value for the loss of which the survivors had a right to be compensated, in view of its circumstances. In estimating it, considerations that personal exertions may ever be required of its possessor, or the possible want of capacity in such possessor, are not to be taken into account. All stand on a platform common to their positions, and the value of the loss to be compensated is to be estimated with a view thereto. None are without value in the eye of the law, and because there are difficulties in the way of determining the question of value, it is not a good reason for denying it altogether. The sound sense of the jury must ascertain the pecuniary value by which it is to be estimated from the evidence in the case as best they may.”¹

The loss is what the deceased would have probably earned by his intellectual or bodily labor in his business

¹ *Pennsylvania R. R. v. Keller*, 67 Pa. 300 (1871). THOMPSON, C. J.

or profession during the residue of his lifetime, and which would have gone for the benefit of his children, taking into consideration his age, ability, disposition to labor, and his habits of living and expenditure.¹

Nursing after the injury and before death, medical expenses, and funeral expenses may be considered by the jury.²

In an action by children for the death of a father, it is improper to admit evidence of their dependence on their grandparents and the circumstances of the grandparents.³

The statutory right to recover damages for death is for the wrong and injury to the persons to whom the right of action is given, and not to the wrong and injury to the deceased. Damages cannot therefore be given for the pain and suffering experienced by the deceased before death.⁴

The court must give the jury instructions as to some definite measure of damages to guide them. It is improper to leave them at liberty to adopt any one they may see fit. Thus where the court instructed the jury that they might award plaintiffs as compensation for the death of their father, the probable amount of his accumulations for the time he might reasonably have been expected to live, and then added, "if you can find a better rule you are at liberty to adopt it," it is error.⁵

In case of death it is error to charge the jury as fol-

¹ *Pennsylvania R. R. v. Butler*, 57 Pa. 335 (1868); *Fink v. Garman*, 40 Pa. 95; *Pennsylvania R. R. v. Henderson*, 51 Pa. 315 (1865); *Pennsylvania R. R. v. Keller*, 67 Pa. 300 (1871).

² *Cleveland & Pittsburgh R. R. v. Rowan*, 66 Pa. 393 (1870).

³ *Pennsylvania R. R. v. Butler*, 57 Pa. 335 (1868); *Del. & Hudson Canal Co. v. Barnes*, 31 Pa. 193.

⁴ *Coakley v. North Pennsylvania R. R.*, 5 Clark, 444 (1858).

⁵ *Pennsylvania R. R. v. Butler*, 57 Pa. 335 (1868); *Pennsylvania R. R. v. Books*, 57 Pa. 339 (1868).

lows: "The question of damages is for you; should you feel it necessary to examine that question, let fair and exact justice be your guide, and your own good sense will determine it." It is the duty of the court to give definite instructions to the jury as to the true measure of damages.¹

An instruction, in an action against a corporation for a negligent killing, to consider the question of damages "from a broad and sensible point of view, and liberal, because it is not a case to cut off corners too closely," is unwise, to say the least, though perhaps not of itself requiring reversal.²

While the court must lay down some rule for the guidance of the jury in determining the amount of damages, it is not error, after giving proper instructions, to say to the jury that "much is left, and must always be left, to your sound discretion."³

The right to recover damages for death is exclusively statutory, and is capable of restriction and limitation by the legislature. As the Act of April 4, 1868, confines damages to loss that has "been pecuniarily suffered or sustained," exemplary damages cannot be recovered.⁴

The Act of April 4, 1868, limiting the amount to be recovered in cases of death, is unconstitutional.⁵

¹ *Pennsylvania R. R. Co. v. Vandiver*, 42 Pa. 365. READ, J., said: "It is more necessary in case of death to lay down the rule of damages clearly and distinctly, as it applies, as is correctly said by a learned judge, 'not only to great railway companies, but to little tradesmen, who send out a cart and horse in the care of an apprentice.' And so sensible have been some of the neighboring sister States, such as New York, New Jersey, and Ohio, of the danger of excessive damages in such cases, that they have limited them to \$5,000, an example which we have not yet followed."

² *Steinbrunner v. Pittsburgh & Western Ry.*, 146 Pa. 504 (1892).

³ *Pennsylvania R. R. Co. v. Ogier*, 35 Pa. 60 (1860).

⁴ *Cleveland & Pittsburgh R. R. v. Rowan*, 66 Pa. 393 (1870).

⁵ *Lombard & South Street Passenger Railway Co. v. Steinhart*, 2 Pennypacker, 358 (1882).

Death of Husband.

340. The value of a husband's life to his wife is determined by ascertaining how much better is her pecuniary resources and prospects she would be with him, than without him.

In *Catawissa R. R. v. Armstrong*,¹ WOODWARD, C. J., said: "The action was brought by a wife for the killing of her husband, and the jury were instructed to put a value upon his life, and in doing this, to have regard to his probable gains and accumulations, his age, his health, his usual wages and the family he had to support. We have said that in this class of action all that can be sought or recovered is pecuniary indemnity for a pecuniary loss, and we think nothing else was submitted to the jury in this instance. The value of a husband's life in a wife's action at law for damages for killing him means the pecuniary value; how much better in her pecuniary resources and prospects would she be with him than without him. The obligation to support herself and the children is transferred by his death from him to her, and her chance to be endowed out of his future accumulations is destroyed; and these are pecuniary injuries to her, and deserve redress at the hands of the party who caused them. In the nature of things there can be no fixed standard for their admeasurement; the discretion of a jury properly instructed and directed is the standard. When such questions have been committed to juries without instructions that pointed them to the right elements of an estimate, we have reversed judgments; but when, as here, the true grounds of estimate are suggested and explained, the judge has done his whole duty, except to see that extravagant verdicts, if rendered, be not sustained."

¹ 52 Pa. 282 (1866).

In an action by a widow to recover damages for the death of her husband it is not improper to ask a witness "from his knowledge of decedent's age, habits, health, and physical condition how long he would have been useful to his family," but it would be improper to charge that if the deceased "was largely indebted at the time of his death the plaintiff would have no pecuniary interest in his life until his debts were paid."¹

Death of Wife.

341. In an action by a husband to recover damages for the death of the wife, if it appears that the deceased had been a healthy woman, it is not necessary nor proper for the plaintiff to prove that she possessed any special or exceptional good qualities, as he might have done if the subject of his loss had been a horse or other animal.²

In an action by a husband for the death of his wife nothing is allowable for the suffering of the deceased nor of the wounded feelings of the plaintiff. He can recover only for the pecuniary value of the services of his wife, but this value is to be measured by the nature of the service characterized as it is by the relation in which the parties stand to each other. "Certainly the service of a wife is pecuniarily more valuable than that of a mere hireling. The frugality, industry, usefulness, attention, and tender solicitude of a wife and mother of children surely makes her services greater than those of an ordinary servant, and therefore worth more. These elements are not to be excluded from the consideration of a jury in making a mere money estimate of value."³

¹ Pennsylvania R. R. Co. v. Henderson, 51 Pa. 315 (1865).

² Delaware, Lackawanna & Western R. R. v. Jones, 128 Pa. 308 (1889).

³ Pennsylvania R. R. v. Goodman, 62 Pa. 329 (1869).

Death of Son Over Twenty-one Years of Age.

342. A mother may recover damages for the death of her son above age if the family relation existed between them at the time of his death, and there were reasonable grounds on her part to expect future pecuniary advantages from the continuance of this relation.¹

A son, twenty-eight years of age, was killed by an accident on a railroad. He had been away from home at intervals after he had attained his majority, and had been in business on his own account. He had returned, however, to his father's house, and for some months had been rendering services of various kinds in his father's business, for which no compensation was paid him. It was properly left to the jury to determine whether the parental and filial relation was subsisting, and whether there was reasonable ground to believe that it would continue to exist.²

Under the Act of April 26, 1855, if a son over the age of twenty-one years continues to bear the family relation to his parents, and there is reasonable expectation that he will be of a pecuniary advantage to them, his parents may recover damages for his death. Thus a son over the age of twenty-one made an arrangement to become a substitute for a drafted man, and had declared his intention to give his bounty-money to his parents. On his way to join the army he was killed in a railroad accident. It was held that these facts were proper evidence on the question of the continuance of the family relation.³

Death of Infant.

343. Under the Act of April 26, 1855, a widowed mother may recover damages for the death of her child

¹ Pennsylvania R. R. v. Keller, 67 Pa. 300 (1871).

² North Penna. R. R. v. Kirk, 90 Pa. 15 (1879).

³ Pennsylvania R. R. v. Adams, 55 Pa. 499 (1867).

by negligence, and in estimating damages, the value of the child's services is an element to be considered by the jury. "The legislature did not undertake to define the damages, and yet the power of a widowed mother to recover damages for the injury causing the death of her son is expressly given. What damages? Such as a court and jury, in view of all circumstances, should consider reasonable. If this was not what the legislature meant their meaning is past finding out. Both parents are grouped among the persons entitled to recover damages, and by necessary implication the same damages, or damages estimated by a common standard. If the father could recover for the loss of the son's services, which is a conceded point, the legislature have imparted the same to the mother; and she may show what they were worth to her, as if she had acquired a right to them by arrangement and contract, if not by law, and of course how much she was pecuniarily injured by his untimely taking off. Thus far the legislature has compelled us to go. We keep step with them, and limit the mother's right to a case of death and not of maiming, because they have changed the rule of the common law no further than this. Where the injury does not result in death, we decided at the present term in *Railway Co. v. Stutler*, that the mother has no right of action for loss of a son's service, but where it does not result in death we sustain the action by virtue of the Act of Assembly. For the discrepancy of these rules we are not responsible. Nursing and medical attendance before the death, and funeral expenses afterward, are proper elements of estimate, but the value of services lost is equally legitimate since the statute."¹

¹ WOODWARD, C. J., in *Pennsylvania R. R. v. Bantom*, 54 Pa. 495 (1867). See, also, *Pennsylvania R. R. v. Zebe*, 37 Pa. 420 (1860); *Stetler v. Railroad Co.*, 6 Phila. 178 (1866).

In an action for the death of a child no compensation can be allowed for the distress and anguish of the parents, but they may recover for any expenses to which they were subjected by reason of the accident.¹

Parties.

344. The action is properly brought in the name of all of the children, and the recovery is for the benefit of all, the amount to be distributed as in the case of an intestacy. The apparent incongruity with the rule, in ordinary cases of tort, must not control the terms of the statute, which could undoubtedly give the remedy in a joint or several form, and has given it in the former. The recovery is for the benefit of all children, for the statute provides that the money so recovered shall be distributed in the same proportion amongst them, as in the case of the estate of an intestate. This answers the objection made that none may recover but such of the children as are injured by the death. The law gives it to them all in equal proportions, and if we are careful to remember that the value of the life lost, to be estimated by a pecuniary standard, is what is to be recovered for, we shall fall into no such error as in supposing that none but those who can show some actual damage are entitled to recover. If such were to be the rule, we should have the indecent spectacle of an investigation whether the loss of a parent or child was or was not in fact an advantage rather than a loss, for certainly, if none be allowed to recover but such as are able to show a pecuniary loss, the defendants would, with great apparent reason at least, be entitled to claim the right to prove the contrary, and to show peradventure that, by the death the party suing may have succeeded to an estate, or, on the other hand, had been re-

¹ *Coakley v. North Pennsylvania R. R.*, 5 Clark, 444 (1858).

lieved from the burden of maintenance. In case of the death of aged persons or helpless infants, we might expect in the application of such a rule to have the point discussed whether the death was an actual loss or gain. The law means not to open the door to anything so shocking. It treats the value of the life lost as a species of property, and gives it, where children sue, to them in the same proportions as the personal estate of an intestate is distributed. This is what the act says and means, and hence the propriety of joining all the children as plaintiffs. Fewer than the whole number might maintain suits, it is presumed, where any have released, but that case is not before us."¹

Under the Act of April 24, 1855, P. L. 309, an action brought to recover damages for an injury causing death should be brought by the widow without joining the minor children of the deceased; but when they are joined, and no objection made to this in the court below, the Supreme Court will not reverse for this reason, after verdict and judgment.²

The mother of a bastard child is not a "parent" within the meaning of the Act of April 26, 1858, § 1, and cannot recover damages for injuries resulting in his death.³

Death Caused by Negligent Act in Another State.

345. An action may be maintained in Pennsylvania to recover damages for a death caused by the negligence of a railroad company in New Jersey if service of process can be obtained in Pennsylvania. The statute of New Jersey, permitting damages to be recovered for the death of a relative, is substantially the same as the statute of

¹ THOMPSON, J., in *North Pennsylvania R. R. v. Robinson*, 44 Pa. 175 (1863).

² *Philadelphia, Wilmington & Baltimore R. R. v. Conway*, 112 Pa. 511 (1886).

³ *Harkins v. Philadelphia & Reading R. R.*, 11 W. N. C. 120 (1881).

Pennsylvania on the same subject, and the Pennsylvania courts will by comity enforce the New Jersey statute. "At common law," said TRUNKEY, J., "purely personal wrongs, as respects civil remedy, died with the person who received them; but whether just or unjust, that rule has been abrogated to a great extent by statutes both in this country and in England. In the earlier period of such legislation there was a tendency to adopt the principle that 'where a new right of action is given by the statute for that for which no action would lie at common law, such an action can only be brought in the State or country whose statute gives the right, and for the wrongs then suffered.' This is sustained by some decisions, among them *Richardson v. N. Y. Cent. R. R.*, 98 Mass. 85, and *Anderson v. R. R.*, 37 Wis. 321. The general rule is, as to personal torts which give a right of action at common law, that the action may be brought wherever the wrong-doer may be found, and jurisdiction of his person may be obtained. In actions *ex contractu*, their transitory character, and the jurisdiction of the courts to entertain them, are the same whether the right be given by statute or the common law. Like rule has recently been applied in Minnesota in an action *ex delicto*, the court remarking that where either by common law or statute, a right of action has become fixed and legal liability incurred, if transitory it may be enforced in the courts of any State which can obtain jurisdiction of the defendant, provided it is not against the public policy of the laws of the State where it is sought to be enforced. The statute of another State has no extra-territorial force, but rights under it will always, in comity, be enforced, if not against the policy of the laws of the forum. In such cases the law of the place where the right was acquired or the liability was incurred, will govern as to the right of action,

while all that pertains merely to the remedy will be controlled by the law of the State where the action is brought.”¹

If the negligent act causing death occurs in another State the suit, if brought in this State, must be brought in the name of the person to whom the right is given by the statute of the other State. Thus a New Jersey statute providing that “every such action shall be brought by and in the names of the personal representatives of such deceased person,” but “for the exclusive benefit of the widow and next of kin,” does not authorize a widow to sue in her own name in the courts of this State upon a cause of action accruing in New Jersey.²

Where an action is brought in Pennsylvania to recover damages for an injury by the negligent act of a railroad company in New Jersey, the New Jersey statute which provides that such actions must be brought within two years next after the cause of action shall have accrued cannot be pleaded in Pennsylvania.³

Evidence.

346. In an action for negligence resulting in death the Carlisle tables are admissible in evidence to show the expectation of life where the state of health of the deceased and his habits of life have been previously shown. The value of these tables when applied to a particular case depend very much upon the state of health of the person, his habits of life, his social surroundings, and other circumstances.⁴

¹ Knight v. West Jersey R. R., 108 Pa. 250 (1884).

² Usher v. West Jersey R. R., 126 Pa. 206 (1889). See, also, Patton v. Railway Co., 96 Pa. 169.

³ Morgan v. Camden & Atlantic R. R., 18 W. N. C. 128 (1886).

⁴ Steinbrunner v. Pittsburgh & Western Ry., 146 Pa. 504 (1892).

Evidence that the parents received the amount of a policy of insurance is inadmissible.¹

In an action to recover damages for the death of an engineer a fireman is not a competent witness to testify as an expert to the necessity of a safety switch at a particular place.²

¹ *North Penn. R. R. v. Kirk*, 90 Pa. 15 (1879).

² *Ballard v. New York, Lake Erie & Western R. R.*, 126 Pa. 141 (1889).

CHAPTER XXVII.

NEGLIGENCE—ACCIDENTS AT PUBLIC GRADE CROSSINGS.

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| 347. Duty to Stop, Look, and Listen. | 355. Duty of Traveler to Alight from Wagon. |
| 348. Failure to Stop, Look, and Listen is Contributory Negligence | 356. Stopping at Proper Place. |
| 349. Standing Between Tracks. | 357. Presumption of Care on the Part of Person Injured or Killed. |
| 350. Obstruction of View by Standing Cars. | 358. Speed. |
| 351. Obstruction of View by Moving Train. | 359. Signals. |
| 352. Obstruction of View by Piles of Material. | 360. Safety Gates and Flagmen. |
| 353. Obstruction of View by Railroad Works. | 361. Permissive Crossing. |
| 354. Infants. | 362. Crossing over Siding. |
| | 363. Independent Contractors. |
| | 364. Defects in Crossing. |
| | 365. Evidence. |

Duty to Stop, Look, and Listen.

347. A person about to cross a railroad track is bound to stop, and look, and listen for trains.

The duty to stop, look, and listen before crossing a railroad grade is a rule of law and not merely a rule of evidence. It is made quite as much for the safety and protection of passengers on the train as for travelers on the highway. The stopping is an essential part of the rule to enforce attention to the accompanying duties of looking and listening, and to secure their performance in something more than a prefatory and heedless way.¹

¹ *Aiken v. Pennsylvania R. R.*, 130 Pa. 380 (1889); *McNeal v. Pittsburgh & Weston Ry.*, 131 Pa. 184 (1889); *Reeves v. Delaware, Lackawanna & Western R. R.*, 30 Pa. 454 (1858). See *Phila. & Trenton R. R. v. Hogan*, 47 Pa. 244 (1864).

The earliest railroad accident case in Pennsylvania reached the Supreme Court

Failure to Stop, Look, and Listen is Contributory Negligence.

348. If a person does not stop, look, and listen before attempting to cross a railroad track, he is guilty of contributory negligence, and cannot recover.¹

Plaintiff's wife was killed at a grade crossing. At the place where the accident occurred there were three main tracks and a siding. The deceased crossed the siding and one track before she reached the track upon which she was struck. It appeared that on both the siding and the first track she could have had an unobstructed view of the railroad for a distance of nine hundred feet in the direction from which the train came which struck her. It was held that the plaintiff could not recover.²

Plaintiff was injured at a grade crossing. He testified that he stopped his team about fifteen or twenty feet from the track, looked each way along the railroad, and listened, and that he neither saw or heard a train approaching. He then drove on and while upon the track was struck and injured. The facts as shown by the plaintiff's own case, were this: (a) The track was straight and smooth and unobstructed, so that from the crossing, or the point where the plaintiff says he stopped to look and listen, it

on writ of error in February, 1839. The plaintiff brought an action of trespass *vi et armis* against the Philadelphia, Germantown & Norristown Railroad Company to recover damages for personal injuries sustained, and the loss of a wagon and horse by a collision with one of defendant's locomotives. The plaintiff recovered a verdict, but on writ of error the judgment was reversed on the ground that as the accident was caused by the negligence of the defendant's servant, case and not trespass was the proper remedy: *Philadelphia, Germantown & Norristown R. R. Co. v. Wilt*, 4 Wharton, 143 (1839).

Where in an action to recover damages for personal injuries sustained at a grade crossing the jury find a special verdict that plaintiff knew of the crossing and stopped, looked, and listened before approaching it, but failed to find in the verdict that the crossing was a public one, and that plaintiff was a traveler lawfully upon it, a judgment for the plaintiff on the verdict cannot be sustained: *Pittsburgh, Fort Wayne & Chicago R. R. Co. v. Evans*, 53 Pa. 251 (1866).

¹*Schnitz v. Pennsylvania R. R.*, 6 W. N. C. 69 (1878).

²*Lees v. Philadelphia & Reading R. R.*, 154 Pa. 46 (1893).

could be seen for more than half a mile in either direction. (b) The speed of the train was from ten to twelve miles per hour. (c) The engine was running backward with a large reflecting head-light perched upon the top of the tender, facing toward the crossing, and another in its usual place on the front of the engine. (d) The time was about three o'clock A. M. while darkness still prevailed. It appeared from these facts that if the plaintiff moved at the rate of four miles per hour he would pass over the twenty-four feet necessary to bring him upon the track in about four seconds. If the train was moving at the rate of twelve miles per hour, it would pass over three times that distance in the same time, or seventy-two feet. The court held that plaintiff was not entitled to recover on the ground that if he had stopped and listened he must have heard the noise of the train; and if he had looked he was bound to have seen the head-light. WILLIAMS, J., said: "The fact that four or five seconds after he says he looked and listened he was struck by a train that must have been plainly visible and almost on him at the time he alleges he looked, is so palpably and absolutely irreconcilable with the truth of his statement that he did stop, look both ways, and listen, before driving upon the crossing, that it is trifling with justice to permit a jury to find that it is true. Such a finding is absurd. It is simply and flatly impossible that one can stop, look, and listen for an approaching train that is in plain view and close at hand and be unable to see or hear it if he possesses the senses of sight and hearing. It seems, therefore, necessary to advance one step in the application of the doctrine of legal presumption, and to lay it down as a rule that one who is struck by a moving train which was plainly visible from the point he occupied when it became his duty to stop, look, and listen, must be

conclusively presumed to have disregarded that rule of law and of common prudence, and to have gone negligently into an obvious danger. A line of well-considered cases leads fairly up to this conclusion. In *Carroll v. The Pennsylvania Railroad Co.*, 12 W. N. C. 348, we said: 'It is in vain for a man to say he has stopped and looked and listened if, in despite of what his eyes and ears must have told him, he walked directly in front of a moving locomotive.' The same principle has been recognized in *Mulherrin v. Railroad Co.*, 81 Pa. 366; *Moore v. Railroad Co.*, 108 Pa. 349; *Pennsylvania Railroad Co. v. Mooney*, 126 Pa. 244; *Bacon v. D., L. & W. Railroad Co.*, 143 Pa. 14."¹

Plaintiff was hurt while attempting to cross a railroad track immediately in front of an approaching train. It appeared from her own testimony that she was not injured on the track, but just as she was about to step upon it, and that she walked directly up against the locomotive when it was moving. It was held that she was not entitled to recover.²

Deceased stepped upon a railroad track in front of an approaching locomotive and was instantly struck and killed. A companion of the deceased was with him at the time, and succeeded in getting across the track in time to avoid a collision. He testified that when they were approaching the track they "stopped to see whether any train was coming. Leightheisel was right alongside of me. We looked down toward Atlantic City; we could not see any train. We did not hear any whistle blown or bell rung. I then started, and ran across the track. The first I saw or heard of the train was when it startled me as it rushed by, just after I got over the track, and as it

¹ *Myers v. Baltimore & Ohio R. R.*, 150 Pa. 386 (1892).

² *Hauser v. Central R. R.*, 147 Pa. 440 (1892).

startled me I slipped and fell. I started and ran across the track. I started to run after we looked for the train, about two yards from the track. I did not see any engine. When I started to run, Leightheisel was right alongside of me."

It was raining violently at the time of the accident, and both the men had umbrellas. Fry, a witness for the plaintiff, said he first saw the men about three hundred yards up the road, and last saw them about thirty yards from the track. Steinmeyer, another witness for the plaintiff, said he could see about two or three squares up the road from the station, and there was evidence that there was a cut through which the road passed about one hundred and fifty yards from the station. The men were crossing the track on a public road, close by the station. There was nothing to prevent them from seeing the train, if they really looked for it, from the point at which Schad, the plaintiff's principal witness, said they looked toward Atlantic City. Steinmeyer said he could see up the road two or three squares, and toward Waterford about two squares, where there was an embankment. Fry said there were about three hundred yards in a square. The accident occurred about five o'clock on an afternoon in August. The clouds were heavy and dark, and the rain fell in torrents. It was held that the plaintiff was not entitled to recover.¹

Plaintiff was driving his wagon behind a street car, and came to a grade crossing. The car crossed in safety. Plaintiff slowed his team, but did not stop. He looked and listened, but heard nothing. The gates were open, and the flagman made a gesture to come on. When in the middle of the track a train emerged from behind a line of cars standing on a track, and struck plaintiff's

¹ *Blight v. Camden & Atlantic R. R.*, 143 Pa. 10 (1891).

team. It was held, apparently on the ground that plaintiff had failed to stop, that a non-suit was properly entered.¹

Plaintiff stepped upon a track of a railroad company at a public crossing, and was instantly struck by a passing train. He testified that he looked up and down the track and saw nothing, but other testimony showed that if he had made use of his eyesight, he must have seen the approaching train. A judgment of non-suit was sustained on appeal.²

The deceased, at nine o'clock, on a rather dark night in January, was walking along Pennsylvania Avenue, in the borough of Wilkinsburgh, and came to the railroad, which, at that point, had then ten or eleven tracks at grade, occupying a space of about one hundred and fifty feet. It was a dangerous place, and at the particular time was made more than usually so by standing cars and piles of pipe and railroad ties which obstructed the view on one side, and on the other side a train on one of the tracks, with an engine blowing off steam. The deceased and his companion walked straight on, without stopping, until they had crossed six or seven tracks, when they saw an approaching train. At this moment they were either on a spur track that ended a few feet beyond the crossing, or between it and the first passenger track, on which the train was coming. Counting the spur tracks as safe, they had a space of forty-five feet of actual safety in which to wait the passage of the train. From the nearest spur track which they were on, or had just crossed, to the passenger track on which the train was, there was a clear space of twelve feet, in which deceased might have waited in safety, and in which his companion did wait. The

¹ *Bard v. Philadelphia, Wilmington & Balt. R. R.*, 25 W. N. C. 250 (1890).

² *Marland v. Pittsburgh & Lake Erie R. R.*, 123 Pa. 487 (1889).

deceased's companion testified: "When we come to the track we noticed a train coming. Q. That is, to the main track? A. Yes, sir; and it was pretty close before we seen it; and Mr. Aikin attempted to go on, and I stopped. I said: 'We had better stop;' and he says, 'Come on, we can get across,' and he started, and I stopped. I had attempted to get across, and by the time I was at the track I could lay my hand on the engine." None of these facts were in the slightest doubt, for the evidence was in behalf of the plaintiff, and was that of the only witness who saw the accident. It was held that the deceased was guilty of contributory negligence, and that his wife could not recover damages from the railroad company.¹

Deceased was killed just as he stepped upon a railroad track at a public crossing. One of the plaintiff's witnesses testified that he saw from a distance of one hundred and fifty yards the deceased in the act of stepping across the crossing, when he was struck by the train and killed. The court held that it was impossible that the deceased could have looked and listened, when the indisputable fact was that he stepped on the track immediately in front of the approaching locomotive. It was accordingly held that plaintiff was not entitled to recover.²

A cripple with a stiff leg left a safe path along the sidewalk of a street to pass hastily, in the night-time and without a light, diagonally over a railroad at a public road-crossing, the condition of which he did not know. He stumbled among the rails and planking, and fell and was injured. It was held that he was guilty of contributory negligence, and that his case was not for the jury.³

¹ Aikin v. Pennsylvania R. R., 130 Pa. 380 (1889).

² Pennsylvania R. R. v. Mooney, 126 Pa. 244 (1889).

³ Delaware, Lackawanna & Western R. R. v. Cadow, 120 Pa. 559 (1888).

The deceased approached a railroad crossing at night, at a point where the view was unobstructed. It did not appear whether he had stopped, looked, and listened. He, however, went upon the track and was killed by a passing train. Witnesses who were near the crossing when the accident occurred testified that they saw the head-light of the engine, and heard the ringing of the bell, when the locomotive was some distance away. It was held that the accused was guilty of contributory negligence in attempting to cross the track in plain sight of a moving engine, and that a compulsory non-suit was properly entered.¹

Plaintiff's son approached a railroad crossing at night. A shifting engine and tender had just passed the crossing when the deceased came to the track, and, as he was crossing, the engineer received the signal to reverse his engine, which he did without giving any warning. The engine, coming back, struck the deceased and killed him. It did not appear from the report whether the deceased stopped before he went upon the track. A compulsory non-suit was sustained.²

Plaintiff's intestate was killed by a railroad train. The place of the accident was a public road crossing, situate about nine hundred and fifty feet east of the station. The train could not be seen from the public road until a person approaching the track was within twelve or fifteen feet of the rails, where the view was unobstructed to the station. There was a cut of about eighteen hundred feet from the crossing. When the train was in the cut, it blew a long, loud whistle, and when in sight of the station the engineer again whistled twice. The whistles were heard by several witnesses. The train did not stop at

¹ *Kelley v. Pennsylvania R. R.*, 19 W. N. C. 400 (1887).

² *Sullivan v. Pennsylvania Co.*, 7 Atl. Rep. 177 (1886).

the station, and passed the crossing at a rate of speed of about thirty miles per hour. Plaintiff's intestate was riding in a closed carriage. The last person who saw him was one of defendant's witnesses, who testified that the deceased did not stop as long as he was in sight of the witness, and that his disappearance from view was almost simultaneous with the collision. The court held that there was no proof of negligence on the part of defendant, and that as there was affirmative, uncontradicted, and unimpeached testimony showing contributory negligence on the part of the deceased, plaintiffs could not recover.¹

Plaintiff's intestate approached a public crossing of a railroad on an embankment twelve feet high. The country was open, and an approaching train could be seen for several hundred feet. The engineer testified that he saw the man and wagon about ninety feet off, that he was going slowly and standing up in his wagon behind the seat. He came within a few feet of the track, and then, the train being near at hand, lashed his horses with the reins to force them across the track. Wagon, horses, and man were caught, the wagon smashed and a horse and the man killed. The train was going at about twenty-five miles an hour. It was held that the deceased was guilty of contributory negligence, and that a non-suit was properly entered.²

Plaintiff's intestate was employed in a mill, the buildings of which occupied both sides of a street on which defendant's railroad was located. At the dinner hour he went over to the buildings on the west side of the street to eat his dinner. While sitting there the whistle sounded for return to work, upon which he instantly started to run across to his own shop, and in crossing the track was

¹ Reading & Columbia R. R. v. Ritchie, 102 Pa. 425 (1883).

² Gerety v. Phila., Wil. & Balt. R. R., 81 Pa. 274 (1876).

caught by a passing locomotive and killed. At the point where he crossed he could not see the engine, nor could the engineer see him. It was held that plaintiff was not entitled to recover.¹

A traveler in an open wagon, in broad daylight, descending a gradual slope for more than a quarter of a mile, within plain view of a railroad upon which a train could be seen coming at a great distance, meeting that train and crossing the track so exactly in time that the hind end of his wagon is struck by the engine, is guilty of contributory negligence.²

A person who approaches a railroad at a crossing in a town with which he is familiar, muffled in his coat within the covered top of his wagon, taking no notice of the railroad, and driving slowly upon the track without stopping or looking out, is guilty of contributory negligence.³

Plaintiff was driving a baker's wagon with closed sides. He was seated far back in the wagon, and on approaching the track did not stop. The grade of the road was slightly above the railroad and sloped down to the track. Near the crossing was a pile of earth, but the stack of a locomotive could be seen above the bank. If the plaintiff had stopped before driving on the track, he could have seen a train a square and a half from the crossing. The court reversed a judgment for plaintiff, on the ground that plaintiff was guilty of contributory negligence.⁴

A person who urges his team across a railroad grade crossing, in disregard of a signal from the flagman to stop, is guilty of contributory negligence.⁵

A carter or any person having charge of a team, who is

¹ *Nagle v. Allegheny Valley R. R.*, 88 Pa. 35 (1878).

² *Pennsylvania R. R. v. Goodman*, 62 Pa. 329 (1869).

³ *Hanover R. R. v. Coyle*, 55 Pa. 396 (1867).

⁴ *North Penna. R. R. Co. v. Heileman*, 49 Pa. 60 (1865).

⁵ *Baltimore & Ohio R. R. v. Colvin*, 118 Pa. 230 (1888).

about to cross a railroad at grade, is bound to stop, look, and listen in both directions before he permits his team to set foot within the rails. An omission to do so is negligence on his part.¹

The driver of a street railway car in approaching a grade crossing of a steam railroad, must stop, look, and listen, even if the flagman of the railroad company signals him to come on, if a passer-by warns the conductor of an approaching train.²

An ordinance requiring conductors of street railway cars to stop their cars and cross the tracks of steam railroads, does not apply to cars on which one man acts as both conductor and driver.³

Where the plaintiff testifies on cross-examination that if he had stopped his horse when he was within ten or fifteen feet of the track and listened, he would have heard the train coming, it was proper to enter a compulsory non-suit.⁴

Standing Between Tracks.

349. It is negligence *per se* for a person to stand between the tracks of the railroad while a train is passing.

Plaintiff approached a public railroad crossing, saw a train passing upon one of the several tracks. He stopped and looked in both directions, and seeing no other trains approaching, he crossed the first track and waited there between two tracks for the train on the furthest track to pass. While standing in this position one of the defend-

¹ O'Brien v. Philadelphia, Wilmington & Baltimore R. R., 3 Phila. 76 (1858).

² Philadelphia & Reading R. R. v. Boyer, 97 Pa. 91 (1881).

³ Philadelphia & Reading R. R. v. Boyer, 97 Pa. 91 (1881).

⁴ Butler v. Gettysburg & Harrisburg R. R., 126 Pa. 160 (1889). See, also, Pennsylvania R. R. v. Beale, 73 Pa. 504 (1873).

ant's engines with the tender foremost came along the track which plaintiff had just crossed, and struck him. There was a clear view of the track for half a mile in the direction in which the engine came. Plaintiff testified that no bell was rung, or whistle blown by the engine which struck him. There was no evidence that the engineer actually saw plaintiff, or that he approached the crossing at an improper rate of speed. It was held that plaintiff was guilty of contributory negligence, and could not recover.¹

Plaintiff passed over the south track of a railroad at a public crossing without stopping or looking, and standing between the tracks waited for a passenger train to pull out from a station. While standing there a gravel train running in the opposite direction struck her. If plaintiff had looked, she could have seen the gravel train from a quarter to half a mile. It was held that she could not recover.²

A person must stop, look, and listen not only for trains upon the first track, but for trains upon all of the tracks.³

Obstruction of View by Standing Cars.

350. It is negligence for a railroad company to permit cars to stand so near a public crossing that a person approaching the crossing will not be able to see along the main track until he actually gets upon it.⁴

A man driving a wagon stopped at a railroad crossing where the view was obstructed by standing cars. After an engine and some freight cars had passed, plaintiff not

¹ *Moore v. Philadelphia, Wilmington & Baltimore R. R.*, 108 Pa. 349 (1885).

² *Snell v. Railroad Co.*, 1 C. P. Rep. 24 (1879).

³ *Wilson v. Philadelphia & Reading R. R.*, 5 Montgomery County Rep. 160 (1869).

⁴ *Pennsylvania R. R. v. Ackerman*, 74 Pa. 265 (1873).

hearing anything drove on and was struck by some moving cars that had been detached from the train. It was held that the case was for the jury.¹

Plaintiff, before sunrise on a dark and foggy morning, with snow on the ground, approached a railroad crossing in a city, stopped about ten steps from it and looked and listened without getting out of his wagon and going on the tracks. The crossing was at the time so obstructed by cars on a siding that the view of the track could not be had until the traveler was directly upon it. One witness testified that a person could not see up the track without getting out on the middle of it. There was evidence that no signal was given, and it appeared that the train was running more rapidly than the city ordinances allowed. The wagon was struck and a horse killed. It was held that the question of plaintiff's contributory negligence was for the jury.²

Plaintiff was injured at a grade crossing. He testified that the crossing was blocked by a freight train when he arrived, and that the employees of the company engaged upon the train, undertook to cut it so that he could pass over. When he came as near to the crossing as practical, he stopped his horse, and looked and listened at a point from which he had a full view of the road for a long distance, and he saw and heard nothing. He waited in this position until he saw the train was about cut, and then he approached the crossing and halted again. When the train was cut he attempted to cross over, and, in so doing, he was struck by an unscheduled freight train running very rapidly, without, as he alleged, either whistling or ringing the bell. The horse was killed and the buggy broken to pieces and the plaintiff severely injured. It

¹ Williamsport & North Branch R. R. v. Weiss, 2 Walker, 217 (1885).

² Pennsylvania R. R. v. Ackerman, 74 Pa. 265 (1873).

was held that the case was for the jury, and a verdict and judgment for plaintiff was sustained upon appeal.¹

Plaintiffs' evidence showed that the deceased while driving over a public crossing of defendant's railroad in the city of Erie was killed by a passenger train. There was evidence also that the train was running at a greater rate of speed than that permitted by the rules of the company. Two witnesses for the defense testified that they saw the deceased drive on the track and that he did not stop, look, and listen. In rebuttal the plaintiffs gave evidence to show that a number of freight cars were standing on the track in the direction from which the train came, and that these obstructed the view of the track, and that the deceased was unable to see the approaching train. It was held that the case was for the jury.²

Deceased was killed at a grade crossing; on the east of the crossing was a station house, and on either side of the main track were long sidings which, at the time of the accident, were filled with box and other cars, obstructing the view of the trains approaching from the east. About thirty-five feet south of the crossing was a bridge, the north end of which was nearly four feet higher than defendant's tracks, so that there was a steep grade from the bridge to the crossing. There was no watchman at the crossing. The evidence tended to show that the express train, by which deceased was struck, passed over the crossing an hour late, at a high rate of speed, without ringing a bell, sounding a whistle, or giving any kind of warning. The deceased stopped and looked at the north end of the bridge, within less than fifty feet of the railroad track. In the opinion of some of the witnesses the

¹ *Bare v. Pennsylvania R. R.*, 135 Pa. 95 (1890).

² *Pennsylvania R. R. v. Weiss*, 87 Pa. 447 (1873).

deceased could have seen, over the box cars, the top of the smoke stack of the engine, and top of the passenger coaches, but the testimony as to this was somewhat conflicting. The testimony was also conflicting as to whether he could have seen the train if he had stopped at another point. It was held that the question of decedent's contributory negligence was for the jury.¹

Plaintiff's intestate with his wife and another woman approached a public railroad crossing where there were five tracks. The party stopped, and all looked and listened, but neither saw nor heard any train approaching. They saw a freight train with an engine attached standing upon the track furthest from them, a short distance above the crossing; but finding that this was not running, they all started to cross. The two women were ahead holding an umbrella, as it was raining, and deceased followed a short distance behind them. When the women reached the fourth track they looked up and saw a passenger train close upon them on that track. They hurried across and were not injured, but deceased who followed after them was struck by the train and killed. The track was straight for some distance each side of the crossing, although the view may have been somewhat obscured by steam from the freight engine. There was some conflict in the evidence as to whether there was any bell rung or whistle blown on the passenger engine. It was held that the case was for the jury.²

A railroad company is entitled to a reasonable time to remove an obstruction near a public crossing. Thus, where cars were overturned near a public road-crossing, the company was entitled to a reasonable time within

¹ *McGill v. Pittsburgh & Western R. R.*, 152 Pa. 331 (1893).

² *Pennsylvania R. R. v. Garvey*, 108 Pa. 369 (1885).

which to remove the cars before it could be held liable for an injury caused by the cars frightening a horse.¹

The injury must be the natural and probable consequence of negligence, such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrong-doer is likely to flow from his act. Thus, where a person knew that there were overturned cars near a public crossing, and that these had frightened horses, yet he drove his own horse past the obstruction, with the result of his horse becoming frightened, he showed by his conduct that he did not regard the injuries which he received as the natural and probable consequences to be apprehended from the obstruction. He therefore could not allege that the railroad company should have known it.²

Obstruction of View by Moving Train.

351. Plaintiff approached the Diamond Street crossing of the Germantown branch of the Philadelphia & Reading Railroad. At this point there were four tracks. When she arrived at the crossing she stopped, looked, and listened, and heard and saw a train approaching from the city, running northward. She stopped and allowed this train to pass. As the last car passed the crossing she again looked and listened, and, neither seeing nor hearing another train, started to cross the tracks. At the moment she started the rear end of the train which had just passed was about a car-length distant. While in the act of crossing the westerly main track, she caught her foot or slipped, and fell, and within ten or fifteen seconds her foot was run over and cut off by a train running southwardly, from Germantown toward the city, at a very

¹ Pittsburgh Southern Ry. v. Taylor, 104 Pa. 303 (1883).

² Pittsburgh Southern Ry. v. Taylor, 104 Pa. 306 (1883).

rapid rate. The evidence showed that had it not been for the up train she would have seen the head-light of the engine of the train approaching in the opposite direction. This engine passed the rear end of the up train at a point about one hundred yards from the crossing. The engineer of the down train testified that his engine was about thirty feet from the plaintiff when she fell. The question of plaintiff's contributory negligence was for the jury.¹

The deceased was observed standing at a crossing about five feet from the east track, on which was slowly passing a long train of coal cars. As soon as the caboose at the rear of the coal train passed he walked across the east track, and in attempting to cross the west one was struck by a passing engine coming from the direction in which the coal train was moving, and was instantly killed. One of the plaintiff's witnesses testified: "Werner (the deceased) was looking on the other side when I first saw him after he had passed the caboose. I can't tell which way the man was looking when he was crossing. He just looked across and started. He must have looked up the track, for he started or drew back, but he did not get away quick enough. Werner just got about a step away from the west track; did not get on it; he was struck on the right side by the beam of the engine; it projects beyond the track about one and one-half feet." Another witness testified: "When he got close to the rail he saw the engine. He threw up one arm and his body back. The beam of the engine struck him under the right side of the shoulder." Another witness said: "As he came to the rail he looked toward the engine and threw himself back, but not far enough to avoid the engine." There was evidence that the train was running at about twenty miles an hour. The bell was ringing and

¹ Philadelphia & Reading R. R. v. Carr, 99 Pa. 505 (1882).

the whistle blown. The distance between the east and west tracks was about seven feet. The coal cars overhang the track about eighteen inches. The morning was thick and it was raining. It was held that the case, though a close one, was for the jury.¹

A driver of a wagon approached a public railroad crossing, and when about fifty feet from the track stopped to wait until the freight train had passed. The freight train having passed the driver looked and listened for any other approaching train, and, seeing and hearing nothing, started across the track. After the horses had stepped upon the crossing he saw an engine approaching. The horses became frightened and jumped forward, and the driver, believing his life in danger, dropped his lines and sprang from the wagon. The horses then ran across the track, when the lead horse, apparently becoming entangled in the lines, was knocked down by the wheel horses and injured so that he had to be killed. The evidence as to whether any signals were given was conflicting. It was held that the case was properly left to the jury, and a verdict and judgment for plaintiff was sustained.²

Plaintiff's intestate approached a public crossing in the built-up portion of a city. He stepped on the curb to let a freight train pass which was running east on the third or fourth track from him. As soon as it was passed he stepped from the curb and walked to the first rail of the first track where he was struck and killed by a train coming west, running at the rate of between thirty and forty miles an hour. From the time he stepped from the curb until he reached the rail he had to traverse twelve to fifteen feet, and at any point of this space he had a

¹ *Pennsylvania R. R. v. Werner*, 89 Pa. 59 (1879).

² *Quigley v. Delaware & Hudson Canal Co.*, 142 Pa. 388 (1891).

clear, uninterrupted view of the track for about three-quarters of a mile. There was no gate at the crossing. The watchman who was stationed there usually went home about ten o'clock. At the time of the accident there was no watchman there. The testimony was conflicting as to whether deceased stopped after leaving the curb; there was no evidence as to his looking and listening. The testimony was also conflicting as to whether the bell on the locomotive had been rung. The whistle blew just as he reached the track. A verdict and judgment for plaintiff was sustained.¹

Obstruction of View by Piles of Material.

352. Plaintiff was struck by a train at a grade crossing early in the morning while it was yet dark. The train by which he was injured consisted of a dozen or more cars which were being backed over the crossing at a considerable rate of speed. No warning of its approach was given by sounding the whistle, ringing the bell, or otherwise, nor was there any brakeman or other person on the fore end of the train, or any light there to give warning of its approaching. It also appeared that a recent snow-fall on the track tended to deaden the sound of the approaching train. In crossing the railroad the plaintiff first encountered the siding. He testified that before stepping upon it he stopped, looked, and listened, but neither saw nor heard the train. Twenty-three feet beyond the siding he reached the main track between which and the siding, and on each side of the crossing, were piles of metal obstructing the view, their edges being three feet from the rail of the main track. Almost immediately after taking the first step upon the main track the train struck the plaintiff. It was held that the

¹ Pennsylvania R. R. v. Coon, 111 Pa. 430 (1886).

question of the railroad company's negligence and the plaintiff's contributory negligence were both for the jury. The court said: "It would be a manifest invasion of the constitutional province of the jury for a trial judge to undertake to say there was no evidence that the defendant's negligence caused injury, or the plaintiff himself was guilty of negligence which contributed thereto. Both of these are questions of fact exclusively to the jury, and not of law to the court."¹

Obstruction of View by Railroad Works.

353. Plaintiff was injured at a grade crossing while driving in a wagon with his wife. It appeared that, at a point in the middle of a bridge one hundred and thirty feet from the crossing, he stopped his wagon, and looked and listened. He then drove on and was run into by a freight train, about one hundred and sixty feet long, backing from the south. At the southeast corner of the crossing was situated an engine-house, extending along the railroad fifty-eight feet and along the highway twenty feet. From fifty to seventy feet south of the engine-house, on the east side of the railroad, some works began, called "High Works." These works apparently obstructed the view of the track from the middle of the bridge. From the middle of the bridge the engine-house partly obstructed the view of the track for about seventy-four feet. No signal was given as the train backed to the crossing. It was held that the case was for the jury.²

Infants.

354. Contributory negligence cannot be imputed to a child of tender years. Thus, where cars are left standing

¹ *Fisher v. Monongahela Connecting Railway*, 131 Pa. 292 (1889).

² *Groner v. Delaware & Hudson Canal Co.*, 153 Pa. 390 (1893).

unlawfully on a public crossing, and a boy six years old attempts to pass under the train and is injured, he may recover damages from the owners of the cars. In the early case of *Ranch v. Lloyd*,¹ *WOODWARD, J.*, said: "I quite agree with the learned judge, that, if the plaintiff had been an adult of ordinary prudence and discretion, he would have no right of action; for, however blameworthy the defendants may have been in leaving their cars on the crossing, common prudence would have restrained him from attempting to pass under them, and an adult would be bound to use common prudence.

"But that the same rule should not be applied to a child of tender years was so successfully demonstrated by *LORD DENMAN*, in *Lynch v. Nurdin*, 1 Ad. & E. (N. S.) 29, and 41 Eng. Com. L. R. 422, and by *CH. J. REDFIELD*, in *Robinson v. Cone*, 22 Vermont R. 224, that I shall content myself with referring to their reasoning. Nor am I unmindful of the counter current of authorities in New York, 21 Wend. 615; 6 Hill, 592; 4 Comstock, 359; but the preponderance of both reason and authority will be found favorable to the two adjudications first named.

"That very case is to be determined by its own circumstances, and that children are to be held responsible only for the discretion of children seem self-evident propositions. A blind man is not bound to see, a deaf man to hear, nor a lunatic to reason; and yet they have a right to redress for injuries inflicted by the negligence of others. Children of tender age are not responsible to the law either criminally or civilly; and that for want of discretion. Of what imprudence was this little boy guilty?

"Living beside the railroad he had become familiar

¹ 31 Pa. 358 (1858); *Philadelphia, Baltimore & Wilmington R. R. v. Layer*, 112 Pa. 414 (1886); *Taylor v. Delaware & Hudson Canal Co.*, 113 Pa. 162 (1886); *Erie City Passenger Ry. v. Schuster*, 113 Pa. 412 (1886).

with cars, and had probably lost much of that instinctive dread with which they are regarded at first. Returning from his errand and finding his road blocked up by cars, which being high freight cars, would admit of easy passage under them, he probably did not stop an instant to reason on the danger. And if he did, the degree of danger would be as likely to attract as to repel him. With another case from Huntingdon County before us at this moment, where a boy under similar circumstances passed under instead of going around a train of cars, it is impossible for us to consider such conduct unnatural. If he had gone out of his track to place himself under the cars, it might be accounted rashness even in a child; but pursuing his highway, he may well have supposed that the men who placed the cars there expected him to pass under them. Considering his age, and all the circumstances of the case, we see nothing that would justify the imputation of negligence or imprudence. He acted as a child, and he is not to be judged as a man.

"In answer to this view it is asked with some concern, are transporters by railroad to be responsible for all the irrational animals that they may get under their cars? Certainly not. If sheep or hogs, or children incapable of reasoning, are permitted to wander in forbidden places, we say not that railroad managers are bound to protect them; but, if they are where they have a right to be, as on a public highway, and are injured by the fault of those in charge of trains, the liability is clear. The strength of the plaintiff's case is that he had a right to pass along the highway, and the defendants had no right to obstruct it. He was in the exercise of a right, in a manner not unreasonable or imprudent for a child, and they injured him by reason of having stopped where they had no right to stop."

Plaintiff, a child six or seven years of age, approached a crossing in a city where a train of freight cars was standing and covering the crossing. One of the cars, loaded with long lumber, projecting over the bumper, was connected with the box car behind it by a beam of wood or coupling pole, six inches or more in diameter, and from twelve to fourteen feet in length. The child entered the opening between the lumber car and the box car, and as he caught hold of the coupling pole which was directly over the street crossing, the train moved and the box car struck him, and threw him upon the track, where three fingers of his right hand were severed by the wheel. The court decided that it was the duty of the railroad company to give plaintiff notice of the starting of the train, and that in the absence of such notice plaintiff was entitled to recover.¹

A boy ten years of age was run over at a public grade crossing about four hundred feet from a sharp curve of the track. It appeared that the hat of the boy's sister had blown upon the track, and the boy, after looking and listening, and neither seeing or hearing the train, went upon the track to get it. The testimony as to whether a bell was rung or a whistle sounded was conflicting. It was held that the case was for the jury.²

In an action to recover damages for the death of a son seven years old, who was killed while riding on the lead horse of a wagon, it appeared that the train was running through the borough at the rate of twenty miles an hour, and no bell was rung or whistle blown till after the accident; that the deceased was a remarkably stout and intelligent boy for his age, and was in the habit of working with his father; that he had often ridden the lead horse in the

¹ Philadelphia, Baltimore & Wilmington R. R. v. Laver, 112 Pa. 414 (1886).

² Wilson v. Pennsylvania R. R., 132 Pa. 27 (1890).

team, and had, on the day he was killed, taken the horse by a way under the railroad to the place of loading, and geared him to the wagon while his father put on the load; he got on the horse, and the team was driven near to the railroad and stopped; that the plaintiff went upon the track, looked both ways, listened, and neither seeing nor hearing an approaching train, started back, telling the boy to come ahead; that the team was started before the plaintiff reached it; he took the mule by the head, the horse got his forefeet on the track, and was struck within three seconds from the time a witness, who was standing by, saw the cars; that as soon as the witness saw the train he hallooed, the plaintiff hallooed, but the train was too fast. Not a witness saw anything that could have been done to save the horse or boy between the time of hearing the train and the accident. It was held that the case was for the jury.¹

A boy nine years old was sent by his mother on an errand across a railroad track at a point where a large number of people were in the habit of crossing, but where there was no public crossing. It was proper to leave the question of the mother's negligence to the jury.²

It is not contributory negligence for a father to send a boy nine years old on an errand along a lawful highway crossing a railroad.³

In violation of the Act of March 20, 1854, a train of cars was stopped across a street leading into the borough of Huntingdon, and while standing there the plaintiff's son, a boy nine years old, returning from an errand, attempted to pass under the cars, and while doing so was

¹ *Pennsylvania R. R. v. Bock*, 93 Pa. 427 (1880).

² *Pennsylvania R. R. v. Lewis*, 79 Pa. 33 (1875).

³ *Pennsylvania R. R. Co. v. Kelly*, 31 Pa. 372 (1858).

injured by the cars being set in motion. It was held that the plaintiff was entitled to recover.¹

Duty of Traveler to Alight from Wagon.

355. If a traveler approaches a public crossing in a carriage or wagon, and is not able to see the track by looking out, either on account of obstructions or fog, it is his duty to get out, and, if necessary, lead his horse and wagon.²

If, however, the view of a track at a crossing is so obstructed by standing cars that a person could not see along the track until he was actually upon it, he is under no duty to get out of his wagon and lead his horse, as the result would probably be the loss of his own life as well as that of his horse.³

It is not the duty of a traveler about to cross a railroad track at a public crossing to alight from his vehicle and go upon the track when he can get a view of the crossing without alighting, and whether, in a given case, he has stopped to look and listen at the best place is always a question of fact for the jury.⁴

Stopping at Proper Place.

356. Where there is doubt as to the proper place to stop, look, and listen before crossing a railroad track, the question will as a general rule be referred to the jury; but where there is no such doubt, and it appears that the person injured stopped at a point where he could not see, it is for the court to determine whether the point was a proper place to stop.⁵

¹ *Pennsylvania R. R. Co. v. Kelly*, 31 Pa. 380 (1858).

² *Pennsylvania R. R. v. Beale*, 73 Pa. 504 (1873).

³ *Pennsylvania R. R. v. Ackerman*, 74 Pa. 265 (1873).

⁴ *Ellis v. Lake Shore & Michigan Southern R. R.*, 138 Pa. 506 (1891).

⁵ *Urias v. Pennsylvania R. R.*, 152 Pa. 326 (1893).

Plaintiff was injured at a grade crossing. The road along which he was traveling crossed two railroads about three hundred feet apart. He testified that before he crossed the first road, the New Castle & Franklin, he stopped on a bridge from where he had a full view of both roads, had listened and looked for trains. He further said: "After we crossed the New Castle & Franklin Railroad, I proceeded to cross the Jamestown & Franklin, or Lake Shore Railroad (defendant's company's road). As I drove along there I was standing up back of the seat. As I drove across between the New Castle & Franklin and Lake Shore Railroads, I think I had full view of the Lake Shore road toward Stoneboro, the most of the distance. I neither heard nor saw any train on the Lake Shore road; everything was perfectly still. Before I undertook to cross the Lake Shore road, I stopped, and looked, and listened for trains on it, because there was considerable lumber piled up on it. At the point where I stopped, I think it was about two rods from the Lake Shore road; it might have been a little more or less. At that time I neither saw nor heard any trains on the road." It was held that plaintiff had sufficiently complied with the rule as to stopping, looking, and listening before attempting to cross the railroad. The question whether he stopped at the right place was for the jury.¹

A boy was riding in a wagon in company with his elder brother. They were crossing the track of a railroad, when the wagon was struck by a passing locomotive, and the boy was killed. There was evidence that before driving on the track, they stopped to look and listen. The evidence as to whether they stopped at a favorable and suitable place to see and hear an approach-

¹ *Ellis v. Lake Shore & Michigan Southern R. R.*, 138 Pa. 506 (1891).

ing train, was conflicting. It was held that the case was for the jury.¹

Plaintiff approached a public grade crossing in a sleigh. He stopped within six or seven steps of the railroad, got out of his sleigh, went upon the track, looked up and down the road and listened for trains. Hearing none he returned quickly, got into the sleigh and immediately attempted to cross the track, when he was run into by a train. The evidence was conflicting as to the speed of the train, and whether any signal had been given. It was held that the case was for the jury.²

The view at a public crossing was obstructed in one direction to a point within eight feet of the track. From this point the track could be seen for a distance of about four hundred feet. Plaintiff approached the crossing and stopped about thirty feet from the track, looked in the direction in which the view of the track was not obstructed, listened, looked at his watch to see if a regular train was then due, and drove on, and was injured on the track by a train. The crossing was in the open country where signals could be easily heard. Plaintiff was in a buggy driving a gentle horse. A number of witnesses testified that no signal was given of the approach of the train. It was held that the case was for the jury.³

Deceased heard a whistle, and stopped his team at about fifty feet from the track. Presumably, he looked and listened, but it was undisputed that, on account of the curve of the railroad and an intervening hill, he could have seen but a short distance; and the evidence was that no further whistle or other warning was given, and whether he could have heard the rattle of the approaching

¹ Philadelphia & Reading R. R. v. Noar, 3 Pennypacker, 443 (1882).

² Lehigh Valley R. R. v. Brandtmaier, 113 Pa. 610 (1886).

³ McWilliams v. Keim, 1 Mona. 16 (1888).

train from that point was not certain. After stopping, and, as said, presumably looking and listening, he drove on again; and just at or before reaching the track, there was some evidence that he stopped again, or attempted to do so, but, one of his horses being young and excitable, he either drove or was carried on the track, and the wagon was there struck at about its centre by the locomotive, cut in two, the front part and the horses, uninjured, being thrown on one side of the track, and the back of the wagon on the other, and deceased killed. There was also evidence that the foreman of a gang of workmen at that point had made gestures in deceased's direction, but whether intended for deceased or for the workmen was not clearly understood by the witness. It was held that the case was for the jury.¹

Plaintiff's intestate had driven to Weissport with a load of ties, crossing the railroad, and was returning in the afternoon in broad daylight. He was perfectly familiar with the crossing, having driven over it frequently for several years, often two and three times a week. His team of mules was gentle and manageable. On the return the ascent was steep, passing a row of houses in front of iron works, which extended nearer to the railroad. A watch-house eight feet in width stood about five feet from the railroad and from six to eight from the road he was traveling. Between the iron works and the watch-house was a considerable space through which he could see up the railroad beyond the depot, about six hundred and fifty feet. Plaintiff's intestate drove his team and empty wagon past this opening without stopping, and came to a stand right before the watch-house, the heads of the mules passing the watch-house and being within three or four feet of the outer rail. He stood on his wagon, and ac-

¹ *McNeal v. Pittsburgh & Western Railway*, 131 Pa. 184 (1889).

cording to the testimony of all the witnesses of the plaintiff who saw the occurrence, the watch-house shut out his sight above, in the direction in which the train was coming. In this position he stopped momentarily, turning his head as if looking to each side, then whipped his mules with the lines held in his hands; the mules starting, had just gotten upon the track when the engine struck them, killing one and maiming the other, breaking up the wagon and killing the driver. All the witnesses agree that where the deceased stood in the wagon he could not see up the track; that he did not get down and look past the watch-house, but drove on after a short pause, though unable to see the track on his left side. It was held that the deceased was guilty of contributory negligence, and that plaintiff was not entitled to recover.¹

The deceased approached a railroad track, driving a wagon. At a point eighteen feet from the crossing there was an unobstructed view of the track for nineteen hundred and fifty feet. The deceased did not stop at this point, but drove on to the track, and was killed by the passing train. It was held that the widow could not recover for his death.²

Presumption of Care on the Part of Persons Injured or Killed.

357. Where there is no direct testimony as to whether a person stopped, looked, and listened before going upon a railroad crossing, the presumption of law that he performed his full duty will prevail; where there is direct, affirmative, and credible evidence to the contrary, the presumption of law is rebutted, and will give way to the actual truth.³

¹ *Central R. R. of New Jersey v. Feller*, 84 Pa. 226 (1877).

² *Urias v. Pennsylvania R. R.*, 152 Pa. 326 (1893).

³ *Reading & Columbia R. R. v. Ritchie*, 102 Pa. 425 (1883); *Schum v. Pennsylvania R. R.*, 107 Pa. 8 (1884); *Longenecker v. Pennsylvania R. R.*, 105 Pa. 328 (1884); *Pennsylvania R. R. v. Weis*, 6 W. N. C. 258 (1878).

Where there is positive evidence of the company's negligence, and no evidence whatever of the deceased's conduct at or before the accident, the case should be submitted to the jury. In an action for death the evidence showed that the railroad crossed Linden Street, in Allentown, near the intersection of Front Street, with a double track; that the deceased was last seen alive coming down Front, some distance above Linden Street; that he was found dead on the railroad, lying between the rails on the eastern track, about fifty feet above Linden Street; and that there were marks of blood on the outside of the eastern rail at the crossing on Linden Street. The accident occurred between seven and eight o'clock in the evening, and the night was dark. Two coal trains belonging to the company, one coming down and the other going up, passed each other a square or two below Linden Street; the down train had a head-light, the up train, by which the deceased was killed, had no head-light, and gave no warning of its approach by bell, whistle, or other signal as it passed through the town. It was running at the usual rate of speed, and must have reached the Linden Street crossing just as the down train had passed over it. It was held that the case should be submitted to the jury.¹

Plaintiff, a baker, driving a horse and wagon over a public crossing, was killed by a locomotive. There was no affirmative testimony as to whether he stopped, looked, and listened before going upon the track, although from the uncontradicted evidence it might have been inferred that if he had stopped to look and listen he would have seen or heard the approaching train. It was held that the case was for the jury.²

¹ Lehigh Valley R. R. Co. v. Hall, 61 Pa. 361 (1869).

² Pennsylvania R. R. v. Weber, 76 Pa. 157 (1874).

Four tracks of the defendant's railroad crossed Wood Street in the borough of Middletown, the two central ones being main tracks, and the two outside only sidings. Plaintiff's intestate lived south of the railroad, and was employed in a furniture manufactory, situate north of the railroad. Just before daylight he started from his house and walked along Wood Street toward the place of his employment. At this crossing he was struck and killed by the express train, passing easterly on the main south track. No witness saw it strike him, but his body was soon afterward found, lying between the main track and the siding about two hundred yards east of the crossing. It had evidently been carried there by the moving train. A witness for plaintiff testified that on the morning of the accident he stood near this crossing, and on the north side of the tracks, and by the head-light of the locomotive of the approaching westerly bound freight train he saw a man standing still, between the south main track and the siding, at this crossing; he did not recognize the man, and was unable to describe his clothes; he first saw the man when the locomotive was about thirty-five yards east; that he noticed everything particularly, and thought the man was in a dangerous place and would be killed; that the man continued standing there until the head-light intervened between him and the witness. He further testified that the man stood there about fifteen minutes. The evidence of this witness was to some extent contradicted by other testimony. It was held that the question of the deceased's contributory negligence was for the jury.¹

The deceased and his wife were driving in a one-horse phaeton, and while crossing defendant's tracks were struck by a train and killed. At the point where the accident occurred the carriage road crossed the railroad at an acute

¹ Pennsylvania R. R. v. Fortney, 90 Pa. 323 (1879).

angle, and in the space north of the railroad and east of the carriage road was a field of corn. In the angle nearer the railroad was a willow tree and several locust trees and bushes. These obstructions, according to the testimony, so obscured the view of the railroad that a traveler approaching it from the north on the carriage road could not see the railroad toward the east until he arrived within about ten yards of the track, and then it was visible for only fifty yards east of the crossing, where the railroad turned sharply to the north and was lost to view behind a bank. The train was moving at a rapid rate of speed, and it did not appear that any signal of its approach to the crossing was given. There was no evidence one way or the other as to whether the deceased stopped, looked, and listened. A compulsory non-suit was not sustained, and it was held that the case should have gone to the jury.¹

A girl about fourteen years of age was killed at a railroad crossing. Before the accident she was seen by one of the witnesses standing between the rails, as if doing something with her shoe or foot, and in a moment or two afterward she was struck by the engine and her body torn in pieces. The foot of the girl was afterward found between one of the rails and the planking of the carriage-way in an open or worn space. It did not appear how the foot got there. It was held that negligence on the part of the company was to be presumed from the fact that the foot of the girl was found inserted in a hole or space in the planking close to the railway track.²

If the evidence disclosed the fact that the railroad company was negligent it is not necessary to prove affirmatively that the deceased stopped, looked, and lis-

¹ *Schum v. Pennsylvania R. R.*, 107 Pa. 8 (1884).

² *Brown v. Pennsylvania R. R.*, 15 Phila. 321 (1882).

tened before he went upon the track. In such a case the burden of proving contributory negligence is on the railroad company. Even if one witness testified that deceased could have seen the train coming if he had looked the case should not be taken from the jury.¹

Speed.

358. A high rate of speed in the open country is not negligence *per se*, but the greater the speed the greater the degree of care required in giving warning in approaching a public grade crossing.

A man was killed by a train running at a speed from forty to fifty miles per hour. The engineer who had charge of the train testified that its average running time was fifty-three miles an hour, that it was on time when the accident occurred, and running at its schedule rate of speed. It appeared also that the crossing was in a rural portion of the city, and that the road crossed was an unpaved wagon road, not to be distinguished from the country roads. It was held it was no negligence in running the train at the rate of speed as stated. The court said: "The right of a railroad to move its trains at such rate as the necessities of its business or the requirement of the public may make necessary is subject only to such restrictions as may be found necessary in cities and populous towns. In the crowded centres of business and population the public safety requires the speed to be moderated, but in the open country the single traveler over the wagon road may, under all ordinary circumstances, provide for his safety by compliance with the rule of law and of common sense that requires him to stop, look each way along the track, and to listen for an approaching train before attempting to cross the track. The movement of trains

¹ Weiss v. Pennsylvania R. R., 79 Pa. 387 (1875).

must be regulated by the railroad companies in the exercise of a business discretion and upon consideration of the competition they have to encounter and the necessities of modern business. We do not think the jury may fix a maximum rate of speed at which a train shall be moved in the open country or that a high rate of speed is negligence *per se*. But while railroad companies may move their trains at such rate of speed as the character of their machinery and road-bed may make practicable, they must not forget that increased speed for the train means increased danger to those who must cross the tracks, and that increased care on their part to guard against accidents becomes a duty."¹

It is not negligence for a railroad company to run its trains over a public crossing in the open country at the rate of thirty miles an hour.² But where a railroad crosses a turnpike along which large herds of cattle are in the habit of being driven, it is negligence on the part of the company to approach the crossing at a speed of twenty-five or thirty miles an hour. In *Reeves v. Del., Lack. & Western R. R.*,³ WOODWARD, J., said: "A large drove of cattle is, it is true, an unwieldy body to manage, but we cannot regard its presence on the turnpike as extraordinary. To facilitate the driving of cattle to the eastern markets was one of the purposes for which so many turnpike roads, pointing westward, were built; and they have always been extensively used for this purpose. The railroad company were bound to take notice of this fact when they located their road across the turnpike and in its immediate vicinity for a considerable distance. They knew that large droves of

¹ *Childs v. Pennsylvania R. R.*, 150 Pa. 73 (1892).

² *Reading & Columbia R. R. v. Ritchie*, 102 Pa. 425 (1883).

³ 30 Pa. 454 (1858).

cattle were accustomed to travel there; that droves had the prior right; and the provision of the charter that the railroad should be so constructed as not to obstruct the travel on the turnpike was declaratory of the plaintiff's common-law right, which he enjoyed, in common with all the public, to travel the turnpike with droves as well as with teams."

If a crossing is of exceptionally dangerous character, the railroad company does not perform its whole duty by merely ringing a bell or sounding a whistle. It must also run its trains at a less rate of speed proportionate to the danger.¹

A rate of speed over twenty-five miles an hour in a populous neighborhood of a city is sufficient to convict a railroad company of negligence.²

A city has the power to pass an ordinance regulating the speed of trains within the city limits, even though the trains are run upon property of the railroad company. The power is not limited merely to streets and street crossings. "It may be said that the public has no right to inhibit the speed of the train within the company's own domain, provided the company checks up and crosses the street at the legal rate of speed. But in the exercise of police power such as this, the actual state of affairs must be taken into account; thus not only the difficulty, perhaps the impossibility, of reducing a speed at the rate of twenty-five miles an hour to four or five miles an hour in the short space of three or four hundred feet, but also the fact that (though without right) many persons are found walking upon the tracks of the railroad at all hours. Now, as a matter of police regulation, it will not do to answer, 'let the people, who go where

¹ *Ellis v. Lake Shore & Michigan Southern R. R.*, 138 Pa. 506 (1891).

² *Hagan v. Philadelphia & Trenton R. R.*, 5 Phila. 179 (1863).

they have no right, take care of themselves.' The police power is enacted not only for those who exercise a proper degree of reflection, but for those who may not. Life is too sacred to place its security on a basis so uncertain. Even the discreet and reflecting make mistakes of judgment as well as of right; while infants and others may not judge at all. Therefore the safety of a dense population is to be guarded by the police power in a great city, even though in doing this the power may be called into exercise within the dwellings, the lots, and the private ways of the citizens. We see not that a railroad company has greater rights within the city than others."¹

A rate of speed within the rate allowed by an ordinance is not conclusive upon the question of the company's negligence. The rate limited by the ordinance, however, is to be considered by the jury, regard being had to all the circumstances of the case.²

Signals.

359. It is the duty of those in charge of a railroad train approaching a public crossing to give notice by whistling, ringing the bell, or other device sufficient to warn of the train's approach, and in sufficient time to enable those approaching the crossing to stop, or those on the track to get out of danger.³

If a railroad train has given a proper signal as it

¹ *Pennsylvania Company v. James and Wife*, 32 P. F. Smith, 194; *Pennsylvania R. R. v. Lewis*, 79 Pa. 33 (1875).

² *O'Brien v. Philadelphia, Wilmington & Baltimore R. R.*, 3 Phila. 76 (1858).

³ *Pittsburgh, Ft. Wayne & Chicago Ry. v. Dunn*, 56 Pa. 280 (1867). In an old case it was held that where a whistle is usually sounded at a particular place, a person about to cross the track has a right to expect it, and is bound to a less degree of care if the whistle is not sounded: *Pennsylvania R. R. v. Ozier*, 35 Pa. 60 (1860). It is doubtful whether the rule would now be sustained. See *Greenwood v. Phila., Wilmington & Baltimore R. R.*, 124 Pa. 572 (1889).

approaches a grade crossing in the open country, it is not required to stop or slow up as it approaches the crossing.¹

Plaintiff was injured at a grade crossing while driving in a wagon. The crossing was about one thousand feet outside the borough line of Pottstown, and about two miles from the passenger station in the town. It was at a point where a much frequented turnpike crossed the railroad. At a point on the turnpike two hundred and two feet from the crossing, the railroad could be seen for about four hundred feet from the crossing, and at a point on the road seventy-four feet from the crossing the railroad could be seen for nine hundred and ninety feet. At a point somewhere between twenty-six hundred and thirteen hundred feet east of the crossing, the steam whistle of the locomotive was sounded, and it was heard by eleven witnesses. Plaintiff testified that he did not hear it. When the train went over the crossing it was running at the rate of fifty miles an hour. It was held that the case was for the jury.²

Signals which people are accustomed to hear are often not noticed when actually given, and it is more probable that witnesses are mistaken who say they did not hear a bell than it is that the engineer whose business it was to ring it, was mistaken.³

Where there is a conflict of testimony as to whether a signal was given before a train approached a grade crossing, it is the duty of the court to pointedly call the attention of the jury to the difference between positive and negative testimony upon a question of this kind. In a case where there was such a conflict of testimony, Chief

¹ *Newhard v. Pennsylvania R. R.*, 153 Pa. 417 (1893).

² *Newhard v. Pennsylvania R. R.*, 153 Pa. 417 (1893).

³ *O'Brien v. Philadelphia, Wilmington & Baltimore R. R.*, 3 Phila. 76 (1858).

Justice PAXSON said: "One witness who hears the ringing of a bell is worth more than the testimony of a dozen witnesses who did not hear it, unless in some manner their attention had been especially called to it. The witness who heard the bell either tells the truth or he tells a deliberate and willful falsehood, while the witness who did not hear the bell may be and is probably truthful. The bell may be rung or the whistle blown without attracting the attention of persons who are familiar with such sounds. Several of the witnesses who were called on behalf of the plaintiff, and testified that they did not hear the warning, yet say that they distinctly heard the short, shrill signal of the danger whistle. I have no doubt they were entirely truthful in what they said. The reason they heard the one and not the other is easily reconcilable with common experience. The long whistle, which is used in approaching a station, is so common upon a leading railroad line that persons living in the vicinity, and especially near a crossing, may hear it many times during the course of the day. It is so frequent that they may not notice it. It conveys no meaning beyond the fact that a train is approaching a station or a crossing, but when the shrill warning signal is given by two or more sharp blasts it is likely to attract the attention of persons in the vicinity. It is known to mean immediate danger to some one. Thus we learn from plaintiff's testimony that the danger signal, given just before the accident, attracted the immediate attention of those who did not hear the whistle or the bell at the warning post. They rushed immediately to the windows or other points of observation to see what it meant."¹

Plaintiff's son was killed at a railroad crossing without apparent contributory negligence on his part. The en-

¹ *Urias v. Pennsylvania R. R.*, 152 Pa. 326 (1893).

gineer of the train testified that he rang the bell about half a mile from the crossing, and that the fireman was ringing the bell when he saw the wagon on the track, but he could not say at what point the fireman began to ring, or whether he rang it a quarter of a mile from the crossing. Several witnesses who were in the neighborhood of the crossing at the time in question testified that they heard no bell and no whistles prior to a sharp whistle which was almost instantly followed by the crash of the locomotive striking the wagon. One witness testified that he had a skittish horse tied in the road near the crossing while he was delivering flour to a customer, and he was paying particular attention to listening for any train signal so that he could start for his horse if he heard a train coming, but he heard no warning prior to the shrill whistle which was almost immediately followed by the crash of the collision. He said that if a bell had been rung on the engine prior to the whistle, he had no doubt that he would have heard it; that on another occasion, under similar circumstances, he had heard the bell distinctly as a warning of the approach of the same train. It was held that there was sufficient evidence of defendant's negligence to submit the case to the jury.¹

The testimony of the plaintiff alone that she did not hear any whistle or bell, as against the positive testimony of six other witnesses who did hear, is merely a scintilla of negligence, which is not enough to send the case to the jury.²

Where witnesses testify that they did not hear a whistle or bell, and that as the passenger train was about due, they were giving particular attention, were listening for the whistle, and that if it had been blown they would

¹ Longenecker v. Pennsylvania R. R., 105 Pa. 328 (1884).

² Hauser v. Central R. R., 147 Pa. 440 (1892).

have heard it, their testimony is more than merely negative, and cannot be disregarded.¹

The ringing of a bell is not a proper substitute for the steam-whistle in the case of trains running at a high rate of speed over public crossings in rural districts.²

Safety Gates and Flagmen.

360. Irrespective of circumstances, it is not a common-law duty of a railroad company to station flagmen or maintain gates at public grade crossings. A road may be so constructed, however, by making short curves or deep cuts at a public thoroughfare as to make it more than ordinarily dangerous, and it may thus become the duty of the company to employ a flagman or adopt other adequate means of warning and protection. Where there is extensive travel on a street or other highway crossing a railroad track, the company, as well as the public, is bound to exercise a degree of care and diligence commensurate with the risk of accident. It is the duty of the company, on the one hand, to give timely and sufficient notice of the approach of trains at such crossings, while on the other it is the imperative duty of the traveler to stop, look, and listen for approaching trains before attempting to pass a railroad crossing. While the law does not point out any particular mode or manner in which notice of approaching trains shall be given, it does require that some suitable and adequate means, adapted to the circumstances, shall be adopted and applied.³

The rule requiring a person about to approach a railroad crossing to stop, look, and listen, is applicable

¹ *Quigley v. Delaware & Hudson Canal Co.*, 142 Pa. 388 (1891).

² *Longenecker v. Pennsylvania R. R.*, 105 Pa. 328 (1884).

³ *Philadelphia & Reading R. R. v. Killips*, 88 Pa. 405 (1879).

whether safety gates are maintained at street crossings or not, and whether or not ordinances regulating the speed of approaching trains are observed by the railroad company.

Plaintiff while riding to a fire on a hose carriage approached a railroad crossing during the night time. At the crossing the railroad had for some time kept a watchman, and safety gates, which were lowered upon the approach of trains. Upon the night in question, when the hose carriage approached the crossing, the gates were not lowered; they had become out of order that morning and had not been repaired. The watchman displayed no light and gave no warning. The hose carriage did not stop as it approached the track, in order to afford an opportunity to look and listen; nor did it even slacken its speed, but continued on, was struck by the train, and the plaintiff was thrown off the carriage and injured. It was held that plaintiff was guilty of contributory negligence, and could not recover.¹

Safety gates at a public railroad crossing are a warning of the passing of trains not only to vehicles but to pedestrians, thus if a person on foot passes a gate in broad daylight, and goes upon the crossing, and, while watching one train is struck by another and killed, his contributory negligence will prevent his wife from recovering damages for his death.²

¹ *Greenwood v. Philadelphia, Wilmington & Baltimore R. R.*, 124 Pa. 572 (1889).

The duty to stop, look, and listen is absolute and unyielding. It is for the protection of the train and its occupants, as much or more than for that of travelers on the highway, and no amount of negligence on the part of defendant can absolve the plaintiff from its obligations. The fact that safety gates were up do not and cannot release a person from the necessity of observing the imperative rule for all railroad crossings: *Lake Shore & M. S. Ry. v. Frantz*, 127 Pa. 297 (1889); *Greenwood v. Philadelphia, Wilmington & Baltimore R. R.*, 3 Del. Co. Rep. 534 (1888).

² *Cleary v. Philadelphia & Reading R. R.*, 140 Pa. 19 (1891).

If a railroad company has maintained a gate and stationed a watchman at a public crossing, but subsequently locks the gate back and withdraws the watchman, it is for the jury to say whether the company has been negligent.¹

Permissive Crossing.

361. A person who crosses a railroad track by a common and well-known foot-path used for many years by the public without objection by the railroad company, is not a trespasser.²

When a railroad company has for years, without objection, permitted the public to cross its tracks at a certain point not in itself a public crossing, it owes the duty of reasonable care toward those using the crossing; and whether in a given case such reasonable care has been exercised or not is ordinarily a question for the jury under all the evidence.³

Where a road crossing a railroad has been treated both by the public and the railroad company as a public road, and has been dedicated as such by the owner of the ground, the railroad company is bound to maintain a proper crossing. If in such a place the railroad company constructs a crossing of plank in such a way that a wagon may be caught in a dangerous groove, the company is liable for any resulting injury.⁴

Deceased, accompanied by his wife and child, approached a railroad at a point where there was a permissive crossing. At this point there were four tracks in use with the road-bed graded for a fifth track. A long freight train had stopped on the second track to let the

¹ Philadelphia & Reading R. R. v. Killips, 88 Pa. 405 (1879).

² Philadelphia & Reading R. R. v. Troutman, 11 W. N. C. 453 (1882).

³ Taylor v. Delaware & Hudson Canal Co., 113 Pa. 162 (1886).

⁴ Pittsburgh, Ft. Wayne & Chicago R. R. Co. v. Dunn, 56 Pa. 280 (1867).

passenger train, coming west on the third track, put off passengers at a station seven or eight hundred feet east of the permissive crossing. As the deceased approached the train started, and when the rear locomotive had passed forty or fifty feet he crossed the second track in rear of the freight, stepped on the third track, and then seemed to have for the first time seen and heard the west-bound passenger train. He stopped, and shoved his wife, who was following, back off the track on the second track, threw his child toward the south track, and was himself struck by the locomotive when nearly across the third track. There was evidence that the locomotive of the freight train emitted a dark smoke, obscuring the view. The evidence showed that if the deceased had waited until the freight train had sufficiently passed there would have been no difficulty in seeing up to the station where the passenger train had stopped. A judgment of non-suit was sustained. The lower court, in refusing to take off a non-suit held that persons undertaking to cross a railroad track where there is no public street or crossing are bound to exercise a greater degree of care than when crossing a public street or well traveled accurately-defined highway.¹

A railroad company does not observe common prudence or ordinary care in running its trains at a rate of twenty-five miles per hour in the outskirts of a populous city and at a point not a public crossing where numbers of people are constantly crossing the track. "Is it common prudence," said AGNEW, C. J., "or ordinary care to run into the outskirts of a city at a rate of speed so high and reckless that persons happening on the track are liable at any moment to be overtaken and crushed to death by the ponderous wheels of the swiftly moving engine? Conced-

¹ *Kraus v. Pennsylvania R. R.*, 139 Pa. 272 (1891).

ing that these people are trespassers, yet must we have no regard to the habits, character, condition, and circumstances of a people living in a city and immediately on the line of a railroad? Clearly to disregard them would be contrary to our sense of humanity and to that common judgment of mankind expressed in the maxim, '*Sic utere tuo, ut alienum non laedas,*' and that rule of right doing which requires men to do unto others as they would have them to do unto themselves. But beyond this there is also that supervising authority of the State which, by its police powers, is enabled to regulate even positive rights, when it is necessary for the safety, protection, and welfare of the people. Hence it has been held that the speed of trains through towns and cities may be regulated by municipal ordinances. But the absence of any such positive regulation does not leave the way open to a railroad company to run its trains into a populous town at a dangerous and reckless rate of speed. Are the circumstances of the case not to be heeded, and are the people, regardless of the probability of the loss of life, to be run down and crushed to death merely because they happen to be trespassers? Does no duty rest upon a railroad company, because it is running upon its own track, unfenced and unguarded? Surely we must not disregard the habits, character, and condition of the people, accustomed to run thoughtlessly and unheedingly into danger. We must take into account the feebleness of age and helpless infancy, the infirmity of mind and body of many living on a railroad track, their want of recollection and unthinking heedlessness, their want of apprehension of danger, and entire absence of injury they suppose they do to the hard, rough track of a railroad; the many motives they have to do an act which, though a trespass, is seemingly to them no cause of complaint. Surely the

courts have not lost their power to declare what is ordinary prudence and care in the use of its track by a railroad company merely because the track is its own, and no one may rightfully trespass there. The circumstances which qualify this right must be taken into account and submitted to a jury under proper instructions. It is said that this is to subject the company to the influence of prejudice, and that juries are always unfavorable. The causes of this prejudice it is not proper to discuss, but the common sense of mankind is not often very far wrong. Not to submit circumstances to the jury upon the evidence and under the controlling power of a court is simply to set aside the trial by jury. Whether the population is dense or sparse at the *locus in quo*, what is the likelihood of danger, and what the rate of speed compatible with the public safety under the circumstances are facts which necessarily find their way into the jury box. When it is thus determined that the rate of speed is incompatible with public safety, under the circumstances of the place, the rights of the company, even upon its own track, are qualified by the great law of the public good. Life is too sacred to become the sport of chance or the sacrifice of heedless will."¹

Crossing over Siding.

362. While it is not necessary in all cases that a person should stop, look, and listen, before crossing a private siding, it is the duty of such a person to see if the siding is in actual use at the time he approaches it, and a failure to do this is contributory negligence.²

Deceased was a carpenter working near a private siding running into an iron mill. It was customary to run the

¹ Pennsylvania R. R. Co. v. Lewis, 79 Pa. 33 (1875).

² Ash v. Wilmington & Northern R. R., 148 Pa. 133 (1892).

cars containing supplies into the mill in the morning, and at the same time to remove the empty cars. Just before the accident two empty cars had just been dumped into the mill, and brought to a stop by the brake. The engine had gone a few rods for another, which it was shunting against the two empty cars in order to couple to them, preparatory to drawing them out of the mill, and taking them away. Just at this moment the deceased approached the track from one side, with a piece of scantling in his hand, and, without stopping, looking, or listening, stepped on the track in front of the cars. The impact of the shunted car drove the others suddenly forward a few feet, and upon the body of the deceased. It appeared that the deceased had been at work in or close by the mill for ten days, and must have known of the existence of the siding, and the manner in which it was used. It was held that the plaintiff was not entitled to recover.¹

Independent Contractor.

363. A railroad company cannot release itself from liability to compensate in damages a person injured while crossing its tracks by the plea that the accident was caused by an independant contractor who was operating a part of the railroad by horse power. The court said: "We cannot agree with a proposition of this kind, for the principle, if established, might be the means of relieving the company from all its charter duties so far, at least, as concerns the public safety. The mere question of the power by which its cars are to be moved is of no consequence. If it can contract for horse power, so may it for steam, and it follows that it might relieve itself of all responsibility by contract with its engineers and conductors for the running of its locomotives and trains. It

¹ *Ash v. Wilmington & Northern R. R.*, 148 Pa. 133 (1892).

needs no argument to show that a railroad company cannot escape its charter obligations by a quibble such as this."¹

Where one railroad company operates the line of another railroad company under an agreement by which the first company makes itself responsible for any accident or casualty caused by the negligence of its employees, an action for damages for personal injuries at a grade crossing is properly brought against the first company.²

Defects in Crossing.

364. The rule that a person must stop, look, and listen before approaching a railroad crossing does not apply to a case where a horse which the plaintiff was driving catches his foot between the rail and the plank on the crossing, and before he is extricated a train comes along and breaks his leg. In such a case the true question is whether the railroad company was guilty of negligence in allowing the track at the crossing to be in an insecure condition, and this question is for the jury.³

A person having knowledge of a defect in a crossing must observe proper precautions. Plaintiff's driver drove a loaded cart across the track of a railroad company at a point where the ground was soft and heavy, without placing planks or other material to enable the cart to surmount the rails. The wagon stuck fast and was struck by a train. It was held that the driver was guilty of negligence and plaintiff could not recover.⁴

The plaintiff, an owner of a grain separator, which weighed about 3,500 pounds, attempted to haul the same

¹ Philadelphia, Wilmington & Baltimore R. R. v. Hahn, 22 W. N. C. 32 (1888).

² Hanover R. R. v. Coyle, 55 Pa. 396 (1867).

³ Baughman v. Shenango & Allegheny R. R., 92 Pa. 335 (1879).

⁴ Gramlich v. Railroad Co., 9 Phila. 78 (1872).

across a railroad, at a public crossing, at or about the time he knew a mixed passenger and freight train was due. It was proven that the separator had been disabled by the loss of one hind wheel, which was supplied by a pole placed under the end of the axle, and that it had given trouble on the public road before reaching the crossing; that the accident occurred after dark on a foggy evening; that the public road crossed the railroad at an acute angle at that point, and that there was a small rut on the public road at the left of the crossing, of which the plaintiff had knowledge. The wheel was drawn to one side and fastened in between the railroad tie and the rail, by reason of the acute angle of the roadway crossing the railroad, as the plaintiff alleged, and held there until it was struck by the train. It was held that a compulsory non-suit would be ordered on account of the contributory negligence of the plaintiff.¹

Evidence.

365. In an action for death at a grade crossing, where the declaration avers negligence by the railroad company in running its engine, it is improper to admit evidence that the railroad company built the public road where the accident occurred.²

Although the plaintiff testifies that she did not see the locomotive on account of fog, if it appears from her own testimony that she was able to see another train at a much greater distance, and several other witnesses testify that there was no fog at the time of the accident, there was nothing to submit to the jury as proof that the fog prevented her from seeing the engine.³

¹ *Gates v. Pa. R. R.*, 6 Pa. C. C. R. 4 (1889).

² *Pennsylvania R. R. Co. v. Weber*, 72 Pa. 27 (1872).

³ *Hauser v. Central R. R.*, 147 Pa. 440 (1892).

CHAPTER XXVIII.

NEGLIGENCE—FRIGHTENING HORSES.

366. Frightening Horses.

Frightening Horses.

366. If a railroad company negligently sounds a whistle so as to frighten horses, it is liable for the consequences. What is proper care in sounding a whistle cannot be determined by any fixed rule of law. "It must depend upon the facts of the particular case. That which would be due care in running a train through a sparsely settled rural district might be negligence, if not actual recklessness, in approaching a large city. The steam-whistle is one of the recognized methods of signaling the approach of the train. Its universal use upon railroads is a strong argument in favor of its efficiency. It is shrill and piercing; can be heard for a great distance, and be mistaken for nothing else. Yet it has its disadvantages. More than all other sounds it is a terror to animals unaccustomed to its warning. Where trains are passing through the built-up portions of towns and cities, it is not needed nor often used. In some cases they move slowly, and the ringing of a bell sufficiently answers the purpose of an alarm, and is not so likely to frighten horses. But where it is necessary to warn crossings or bridges at a distance in advance of the train, no sufficient substitute has yet been found for

the whistle. It can be heard in any condition of wind and weather. In the absence of the discovery of any suitable substitute, and in view of its use upon all roads operated by steam, the mere fact of the whistling furnishes no presumption of negligence."¹

The fact that a horse became frightened and unmanageable a short distance from the railroad, if the animal was a gentle one, and was frightened through the negligence of the defendants and being beyond the control of the driver, rushed on the track, is evidence bearing upon the negligence of the company.²

If an engineer while running his engine through a city sounds his whistle in violation of the rules of the company, and for the apparent purpose of frightening a horse, the company is liable for injuries sustained by a person run over by the frightened horse.³

At the intersection of a railroad with a turnpike sixty feet wide, a freight train was cut open, and a gap of twenty or twenty-five feet made to allow persons and teams to cross the railroad. Plaintiff testified that he stopped before crossing, and, being beckoned to come on by a train-hand on the train, drove on, and while on the track there was a rattling noise, resembling the putting on of the brakes, made on or about the train, although no one knew how or by whom it was made, which caused the horse to take fright and run away; plaintiff's efforts to control him were unavailing; the right-hand rein parted where the round and flat parts joined, and the pull on the remaining rein caused the horse to turn to the left, where

¹ Per PAXSON, C. J., in *Philadelphia, Wilmington & Baltimore R. R. Co. v. Stinger*, 78 Pa. 219 (1875). See, also, *Philadelphia & Reading R. R. v. Kellips*, 88 Pa. 405 (1879).

² *Weiss v. Pennsylvania R. R.*, 79 Pa. 387 (1875).

³ *Philadelphia, Wilmington & Baltimore R. R. v. Brannen*, 17 W. N. C. 227 (1886).

there was an embankment; the wagon was upset and broken, its occupants thrown out, and plaintiff's wife injured. The court held that the company had no right to stop its train at the point where it did and to occupy one-half or two-thirds of the turnpike road, and that the question of its negligence was properly submitted to the jury.¹

The engineer of a train, having given notice of its approach, blew his whistle under a bridge whilst a traveler was passing over it, by means whereof his horse took fright, ran off, and injured him. It was held that the omission to give notice by whistling, or other signal, of the approach of a train to the bridge, as well as the blowing of the whistle while the engine was under the bridge, there being no apparent necessity therefor, was properly left to the jury as evidence of negligence.²

If a man drives an unbroken or vicious horse, or one that is easily frightened by a locomotive, along a public road running side by side with a railroad, and liable to be met or overtaken by a train, he does so at his own risk. It is an act amounting to recklessness. That there was no other road for him to use does not matter. There were other horses which he might have procured for use in such a dangerous locality. Duties and obligations are mutual. The railroad company has as high a right to move their trains upon their road as the citizen has to drive his horse along the road. Both are bound to the exercise of care in accordance with the circumstances of the case.³

A locomotive was standing on a track alongside of and slightly above the grade of a public road. Plaintiff was

¹ *Pennsylvania R. R. v. Horst*, 110 Pa. 226 (1885).

² *Pennsylvania R. R. v. Barnett*, 59 Pa. 259 (1868).

³ *Philadelphia, Wilmington & Baltimore R. R. v. Stinger*, 78 Pa. 219 (1875).

driving along the road with a horse which disliked locomotives. As he approached the locomotive, the horse became frightened at the escaping steam and overthrew the vehicle, injuring plaintiff's child. It was held that there was no sufficient evidence of negligence on the part of the company to submit the case to the jury.¹

Plaintiff's servant left a horse standing unhitched and went into the station. The horse was frightened by the whistle of an approaching train and ran upon the track and was killed. There was testimony that the train had not whistled at the whistling post, three hundred yards from the station, and that if it had done so the servant would have heard it in time to catch the horse. It was held that a non-suit was properly entered.²

A horse took fright at an approaching train, while standing near a station on the railroad, and escaping from the boy in whose charge he was, galloped with the wagon to which he was attached, up the highway which crossed the track a short distance further on. The engineer observing this, refrained from sounding the whistle, and after proceeding for three or four hundred yards, stopped the train, in order to allow the horse to cross the railroad in front of the engine. The train having been again put in motion, went slowly up the track parallel to the road on which the horse was moving. The animal had now reduced his speed to a trot, and the danger of collision might have been regarded as at an end, when the horse, suddenly turning into another road at right angles to that on which he was, and again breaking into a run, came in a few bounds directly in front of the locomotive. Although every effort was made to stop the train, which was only going at the rate of six miles an hour, it was

¹ *Drayton v. North Pennsylvania R. R.*, 10 W. N. C. 55 (1881).

² *Edwards v. Philadelphia & Reading R. R.*, 148 Pa. 531 (1892).

found impossible to avoid a collision, and the horse was killed. It was held that the company was not liable for the loss of the horse.¹

Plaintiff's son approached a railroad crossing at night, and when about one hundred yards from the railroad crossing stopped, looked, listened, and neither heard nor saw anything to denote an approaching train. He knew that the company kept a day and night watchman at the crossing, who at night usually waved his lantern at the approach of a train, and hung it outside his box when the track was clear. He did not see the watchman, but saw his lamp hanging on the watch-box. He then drove slowly to a point within ten or twenty yards of the track. Here he first saw the light of an engine and heard the bell. He then stopped again, but his horse took fright, and becoming unmanageable as the train approached, dashed into the engine. At this moment a coal train came down on the near track from the opposite direction, killing the horse and demolishing the buggy. It was held that plaintiff could not recover. The court said: "The plaintiff knew that the locomotive was approaching, and stopped twenty yards from the place, and then his horse took fright and ran into the locomotive. No care on the part of the servants of the company could have prevented what occurred, which, as the learned judge said, was a pure accident."²

Plaintiff was driving a horse and wagon on a street along the centre of which was a railroad. The bell of an engine coming in the opposite direction was rung when about thirty feet from the horse, which took fright and veered around so that the cart which he was pulling was

¹ *Watson v. Philadelphia & Trenton R. R.*, 7 Phila. 249 (1869); s. c. 2 Walker, 456 (1870).

² *Miller v. Philadelphia & Reading R. R.*, 11 W. N. C. 369 (1882).

struck by the locomotive, and plaintiff was injured. The company afterward put a fence between its track and the street. It was held that the plaintiff was not entitled to recover.¹

A horse driven by the deceased was killed at a railroad crossing. At about sixty feet from the track the deceased stopped to wait until a freight train had passed. Just as the freight train had passed, an express train going in the same direction came along. The horse became frightened and unmanageable and rushed upon the track in front of the express train, and the driver was struck with the engine and killed. It was held that there was no sufficient evidence of negligence on the part of the railroad company to submit the case to the jury.²

Plaintiff was driving with his wife and child under defendant's railroad at Twenty-second Street in the city of Philadelphia, when a train of cars on the bridge overhead frightened the horse so that it became unmanageable. All the occupants of the carriage were thrown to the ground, plaintiff's wife was injured, and the child killed. No defect was shown in the construction of the bridge. On the contrary, it appeared that it was the work of competent engineers, approved by the chief engineer and surveyor of the city, and in pursuance of an ordinance of councils expressly authorized. A verdict for the defendant was sustained, the court saying: "The sight and sound of a moving train always have a tendency to frighten horses. In this case, the fright was occasioned by the sound. We cannot measure, nor can a jury be properly allowed to measure, the amount of sound which may be made by a railroad train, either in crossing bridges at overhead crossings or at other places. The

¹ *Fouhy v. Pennsylvania R. R.*, 17 W. N. C. 177 (1886).

² *Joyce v. Pennsylvania R. R.*, 5 Pa. C. C. R. 392 (1888).

defendant company, under all the authorities, has the right to operate its road in a lawful manner; it is not responsible for injuries occasioned thereby.”¹

It is not negligence in a railroad company to sound a whistle in the outskirts of a city at a particular point before the train reached the first of three short curves, the last of which ended on a draw-bridge on a river.²

If an owner is guilty of neglect in permitting a horse to run at large, he cannot recover for its loss although the railroad company is also guilty of negligence.³

¹ *Ryan v. Pennsylvania R. R.*, 132 Pa. 304 (1890).

² *Philadelphia, Wilmington & Baltimore R. R. Co. v. Stinger*, 78 Pa. 219 (1875).

³ *Horricks v. Philadelphia & Trenton R. R.*, 1 Phila. 28 (1850).

CHAPTER XXIX.

NEGLIGENCE—ACCIDENTS ON STREETS AT POINTS OTHER THAN CROSSINGS.

367. Duty of Persons Using Street on which Tracks are Laid. 368. Negligent Movement of Cars on Sidings.

Duty of Persons Using Street on which Tracks are Laid.

367. Where a railroad company obstructs a public street with its cars, the passers-by are bound to the observance of ordinary care—that is, such care as a reasonably prudent man would exercise to preserve himself and property from injury, and whether he has observed such care is a question for the jury. In *Pennsylvania Railroad Company v. McTighe*,¹ it appeared that on the day the plaintiff was injured, three or more of defendant's freight cars were permitted to stand on the defendant's track, on the north side of Liberty Street, in the city of Pittsburgh, from a point near Wayne Street, along in front of warehouses occupied by Martin Heyl, John McCargo, David R. Galway, and others. This track ran parallel with, and twenty feet distant from, the curb in front of these houses. From the inner rail to the middle of the gutter the distance was seventeen and a half feet, and from there to the curb it was two and a half feet—in all twenty feet. The cars were standing there without any motive power attached for some time before

¹46 Pa. 316 (1864).

as well as after the plaintiff was injured. One of the witnesses testified that they stood there while he hauled three loads away from one of the houses above mentioned. The plaintiff backed his dray into McCargo's, at right angles with the pavement, and, after loading four or five barrels of whisky, took his position at the left side of his horse's head with his left hand on the bridle, his right hand on the end of the shaft, and his back toward the cars in the street. When he had turned about half around he came in contact with one of the cars, and immediately thereafter was struck on the side by the end of the left shaft, just below the left armpit, receiving then and there the injury on which the suit was founded. From the report the facts do not seem to be disputed. The court left the question of the plaintiff's contributory negligence to the jury and a judgment on a verdict for plaintiff was affirmed by the Supreme Court.

Plaintiff was leading a horse and cart on a street occupied in its middle portion by the tracks of a railroad company. The tracks were sixteen feet from each curb. Plaintiff walked on the side of the horse which was between him and the track. He noticed the light of an approaching train at some distance ahead, and, thinking the cart too near the track, though it was in a position of perfect safety, attempted to turn the horse toward the siding. In doing so the hindmost part of the cart was struck by the engine, the cart demolished, and he himself sustained severe injuries. Evidence was adduced to prove that the train was traveling at a great rate of speed, a fact which alarmed plaintiff, and did not allow him sufficient time to move to what he considered a place of safety. It was held that plaintiff was guilty of contributory negligence.¹

¹ *McGettigan v. Pennsylvania R. R.*, 5 W. N. C. 235 (1878).

A woman was picking coals in a street not fully opened and occupied for public travel, but which had been actually improved and to some extent used. She testified that she was on a cinder heap six or seven feet from the railroad track, and that the cinder pile slipped under her and that she was run over by a train which came upon her without giving any signal. It was held that the case was properly for the jury.¹

Evidence of the negligence of a railroad company is sufficient to submit to a jury where it appears that the train was backing in a public street of a closely-built part of a city, that the servants of the company were not on the lookout, but were in such a position that they could not see any considerable distance in the direction of the motion, and that the train was running rapidly.²

Plaintiff called with his team at defendant's depot for freight. The company's agent directed him to a position at the station within a few feet of the track, informing him that no train would pass for half an hour. A train came within five minutes, and one of his horses was injured. It was held that plaintiff was not guilty of contributory negligence.³

A railroad company constructed an overhead bridge for the passage of a public highway, leaving the wing walls running out from the end of the bridge unguarded by a railing. Plaintiff, employed as a carpenter by the railroad company, while on his way to his work before daylight on a winter morning, fell over one of the wing walls and was injured. He testified that he was walking rapidly, thinking he would "strike the bridge near about its centre," but ran against something on the left side and

¹ *Pennsylvania Company v. Allen*, 3 Pennypacker, 170 (1882).

² *North Penn. R. R. v. Mahoney*, 57 Pa. 187 (1868).

³ *Allegheny Valley R. R. v. Findley*, 4 W. N. C. 438 (1877).

fell. It was held that the question of plaintiff's contributory negligence was for the jury.¹

Negligent Movement of Cars on Sidings.

368. A railroad company placed four empty cars upon a private track near certain platform scales. In the afternoon of the same day plaintiff's intestate drove a loaded cart upon the scales with the hinder part toward the track. He was standing near the cart when a brakeman unblocked the cars, and put up the brakes. The cars in coming down the track struck the end of the cart which in turn struck the deceased, and killed him. It was held that the company was negligent, and that a verdict and judgment for plaintiff should be sustained.²

Plaintiff, the owner of a lumber and coal yard, had a siding running from defendant's railroad to a warehouse in his yard. A lumber car with a defective brake was left standing on the siding beyond the period when the rules of the company required it to be removed. A number of cars were started on to the siding from the main line, and struck the lumber car, driving it into the warehouse with great violence. It did not appear that the lumber car had been sufficiently blocked. A son of the plaintiff heard the sound of the approaching train, and hurriedly entered the warehouse, and was found crushed to death against the doors. The case was properly left to the jury to determine whether the deceased was guilty of contributory negligence, and whether the railroad company was guilty of negligence.³

Plaintiff, in walking along a path on a dark night, came upon a railroad turn-out, and was struck by a train

¹ *Gates v. Pennsylvania R. R.*, 154 Pa. 566 (1893).

² *West Chester & Philadelphia R. R. v. McElwee*, 67 Pa. 311 (1871).

³ *North Pennsylvania R. R. Co. v. Kirk*, 90 Pa. 15 (1879).

which he had observed approaching, but which he supposed would keep upon the main line. There was evidence that plaintiff had passed over the turn-out twice in the morning of the day upon which he was injured. It was held that the question of plaintiff's contributory negligence was for the jury.¹

¹ *Craven v. Philadelphia & Reading R. R.*, 9 Pa. C. C. R. 157 (1889).

CHAPTER XXX.

NEGLIGENCE—TRESPASSERS.

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| 369. Right of Company to Use of Track Exclusive. | 374. When Train need not be Stopped. |
| 370. Trespassers on Track. | 375. Infant Trespassers on Train. |
| 371. Trespassers on Train. | 376. Contributory Negligence Cannot be Imputed to Child. |
| 372. Trespassers at Station. | 377. Presumption as to Infant's Understanding. |
| 373. Infant Trespassers. | |

Right of Company to Use of Track Exclusive.

369. The use of a railroad track, except at public crossings, is exclusively for the company and its employees.

In *Phila. & Read. R. R. Co. v. Hummell*,¹ STRONG, J., said: "It is time it should be understood in this State that the use of a railroad track, cutting, or embankment, is exclusive of the public everywhere, except where a way crosses it. This has more than once been said, and it must be so held, not only for the protection of property, but, what is far more important, for the preservation of personal security, and even of life. In some other countries it is a penal offense to go upon a railroad. With us, if not that, it is a civil wrong of an aggravated nature, for it endangers not only the trespasser, but all who are passing or transporting along the line. As long ago as 1852 it was said, by Judge GIBSON, with the concurrence

¹ 44 Pa. 375 (1863); *Cauley v. Pittsburgh, Cincinnati & St. Louis Ry.*, 95 Pa. 398 (1880).

of all the court, 'a railway company is a purchaser, in consideration of public accommodation and convenience, of the exclusive possession of the ground paid for to the proprietors of it, and of a license to use the highest attainable rate of speed, with which neither the person nor property of another may interfere.'

"The company on the one hand, and the people of the vicinage on the other, attend respectively to their particular concerns, with this restriction of their acts, that no needless damage be done. But the conductor of a train is not bound to attend to the uncertain movements of every assemblage of those loitering or roving cattle by which our railways are infested: *Railway Company v. Skinner*, 7 Harris, 298. So in *Railroad v. Norton*, 12 Harris, 465, it was said: 'That until the legislature shall authorize the construction of railroads for something else than travel and transportation, we shall hold any use of them for other purposes to be unlawful, if not indeed a public offense punishable by indictment.' But if the use of a railroad is exclusively for its owners, or those acting under them; if others have no right to be upon it; if they are wrong-doers whenever they intrude, the parties lawfully using it are under no obligations to take precautions against possible injuries to intruders upon it. Ordinary care they must be held to, but they have a right to presume and act on the presumption that those in the vicinity will not violate the laws; will not trespass upon the right of a clear track; that even children of a tender age will not be there, for though they are personally irresponsible, they cannot be upon the railroad without a culpable violation of duty by their parents or guardians. Precaution is a duty only so far as there is reason for apprehension. No one can complain of want of care in another where care is only rendered necessary by his own

wrongful act. It is true that what amounts to ordinary care under the circumstances of a case is generally to be determined by the jury. Yet a jury cannot hold parties to a higher standard of care than the law requires, and they cannot find anything negligence which is less than a failure to discharge a legal duty. If the law declares, as it does, that there is no duty resting upon any person to anticipate wrongful acts in others, and to take precaution against such acts, then the jury cannot say that a failure to take such precaution is a failure in duty and negligence. Such is this case. The defendants had no reason to suppose that either man, woman, or child might be upon the railroad where the accident happened. They had a right to presume that no one would be on it, and to act upon the presumption. Blowing the whistle of the locomotive, or making any other signal, was not a duty owed to the persons in the neighborhood, and consequently the fact that the whistle was not blown, nor a signal made, was no evidence of negligence. Were it worth while, abundant authority might be cited to show that the law does not require any one to presume that another might be negligent, much less to presume that another may be an active wrong-doer. The principle was asserted in *Brown v. Lynn*, 31 Pa. 510, and in *Reeves v. The Delaware, Lackawanna & Western Railroad Company*, 30 Pa. 454. It is too well founded in reason, however, to need authority. We act upon it constantly, and without it there could be no freedom of action. There is as perfect a duty to guard against accidental injury to a night intruder into one's bed-chamber as there is to look out for trespassers upon a railroad where the public has no right to be. And the rule must be the same whether the railroad is in the vicinage of many or few inhabitants."

The duty of a railroad company as to adults and chil-

dren on the track is explained by AGNEW, J., as follows:

"The degree of care required of the servants of the company in such a case is dependent in some measure upon the capacity of the injured party. If an adult should place himself upon the railroad where he had no right to be, but where the company is entitled to a clear track, and the benefit of the presumption that it will not be obstructed, and should be run down, the company would be liable only for willful injury, or its counterpart, gross negligence. But if a child of tender years should do so, and suffer injury, the company would be liable for the want of ordinary care. The principle may be illustrated thus: If the engineer saw the adult in time to stop his train, but the train being in full view, and nothing to indicate to him a want of consciousness of its approach, he would not be bound to stop his train. Having the right to a clear track, he would be entitled to the presumption that the trespasser would remove from it in time to avoid the danger, or, if he thought the person did not notice the approaching train, it would be sufficient to whistle to attract his attention without stopping. But if instead of the adult, it were a little child upon the track, it would be the duty of the engineer to stop his train upon seeing it. The change of circumstances from the possession of capacity in the trespasser to avoid the danger, to a want of it, would create a corresponding change of duty in the engineer. In the former case, the adult concurring in the negligence causing the disaster is without remedy, in the latter, the child not concurring from a want of capacity, the want of ordinary care in the engineer would create liability. But if the train were upon the child before it could be seen, or if it suddenly and unexpectedly threw itself in the way of the engine, the engineer being incapable of exercising the measure

of ordinary care to save the child, the child would be without remedy, for the company's use of its track is lawful, and the presence of the child upon the track is unlawful."¹

Trespassers on Track.

370. While an engineer has no right to run down and kill and injure a trespasser upon the track, yet he has a right to suppose that a person upon the track is in full possession of his faculties, and that he will in the event of danger step from the track and avoid it. Unless the engineer's attention is brought to some fact from which he can see that the person upon the track cannot get off, he has a right to believe that such person will use his senses and clear the track.²

A brakeman employed by the Lackawanna & Bloomsburg Railroad Company was injured by a train of the Delaware, Lackawanna & Western Railroad Company. The track was owned by the Lackawanna & Bloomsburg Railroad Company. The former company had the right of trackage over the road by virtue of an agreement between the two companies, and the train of the Delaware, Lackawanna & Western Railroad Company was lawfully upon the track. There were two tracks at the point where the injury occurred. Between the inside rails of said tracks there was a space of seven feet in width, leaving a clear space between passing trains of about three and one-half feet in width, while outside of the southern track there was room to walk without danger. On the morning of June 29, 1871, the plaintiff was on his train approaching Scranton from a northerly direction; when

¹ Philadelphia & Reading R. R. v. Spearen, 47 Pa. 300 (1864).

² Moore v. Philadelphia, Wilmington & Baltimore R. R., 108 Pa. 349 (1885); Little Schuylkill Nav. R. R. v. Norton, 24 Pa. 465 (1855).

near Jackson Street he got off from his train to turn the switch, and having performed this duty, he went to the watchman's house near the switch, where he remained some time in conversation with the watchman, then lighted his pipe and started toward Scranton to join his train, walking on the northern track. When he stepped on said track a train was passing him on the southern track. Instead of waiting until the train had passed, and then crossing over both tracks to the outside of the southern track, where there was a clear space to have walked with safety, he continued walking on the northern track until he was overtaken by defendant's train moving in the same direction, which struck and badly injured him. It was held that plaintiff was guilty of contributory negligence.¹

If a trespasser goes upon the track of a railroad company on a dark night, at a point where there is no crossing and which is a known place of danger, and is run over by a passing train, he cannot recover damages.²

If a person attempts to use a path over tracks which the railroad company had partly closed by a fence, and is injured while crossing the tracks, he is a trespasser and cannot recover.³

In *Little Schuylkill Nav. R. R. v. Norton*,⁴ the plaintiff fastened upon the railroad track a machine for sawing wood, and while engaged in work was injured by a train of the defendants. Held that he could not recover.

Plaintiff was driving his horse, with a truck-car loaded with household goods, on a railroad. He was overtaken by a train of seven cars loaded with coal, running by gravity, which the defendant had undertaken to conduct

¹ *Mulherrin v. Del., L. & W. R. R. Co.*, 81 Pa. 366 (1876).

² *Pittsburgh, Fort Wayne & Chicago Ry., etc., Co. v. Collins*, 87 Pa. 405 (1878).

³ *Comly v. Pennsylvania R. R.*, 22 W. N. C. 42 (1888).

⁴ 24 Pa. 465 (1855).

to Pinegrove. The plaintiff, in his effort to save his horse, caught his foot between the rails at a switch, and had it crushed by the coal cars, which ran over and killed his horse. The court held that he was guilty of contributory negligence.¹

Neither a railroad company nor its agents have a right to authorize any one to obstruct its tracks.

In *Little Schuylkill Nav. R. R. Co. v. Norton*,² where a person had fastened a wood-sawing machine to the track by the permission of the superintendent of the railroad company owning the road, and was injured, WOODWARD, J., said: "Neither Nicolls, the superintendent, nor the Reading Railroad Company itself, had any right to fix such a nuisance on that track. The Reading Railroad Company built the track as a public highway, and the Little Schuylkill Company had, by express contract, the right of passage upon it, but neither company might obstruct the other. It would have been an abuse of their charter powers to authorize machinery to be fastened to the rail for sawing wood or any other similar purpose. It is of the utmost moment to human safety that railway tracks should be kept clear of all obstructions, and used only for the purpose for which they were constructed. The employees, whether authorized or not, have no more right than strangers to pervert them from their original design and devote them to other than the great public objects which bring them into existence. If machinery to saw wood may be erected on rails designed for public travel, other establishments, more or less necessary to the business of railroads, may be also, and thus the perils of travel, already great enough, will be infinitely increased. Until the legislature shall authorize the construction of

¹ *Heil v. Glanding*, 42 Pa. 493 (1862).

² 24 Pa. 465 (1855).

railroads for something else than travel and transportation, we shall hold any use of them for other purposes to be unlawful, if not, indeed a public offense punishable by indictment."

Trespassers on Train.

371. A trespasser cannot be ejected from a train without a reasonable regard for his safety.¹

A boy who, by the connivance of a conductor, is permitted to ride on a train for the purpose of selling newspapers, contrary to the regulations of the company, cannot recover damages for injuries sustained in an accident, although the accident occurred through the negligence of the company's employees.²

Where the evidence shows that it was no part of the duty of a brakeman on a coal train to admit or exclude passengers from a train, the railroad company is not liable for the wanton conduct of the brakeman in throwing lumps of coal at a boy trespassing on the train.³

Trespassers at Station.

372. The platform of a railroad company at its station or stopping-place is in no sense a public highway. There is no dedication to public uses as such. It is a structure erected expressly for the accommodation of passengers arriving and departing in the train. Being uninclosed, persons are allowed the privilege of walking over it for other purposes, but they have no legal right to do so. The servants of the company, after requesting them to leave, can remove them by whatever force may be necessary.⁴

¹ *Arnold v. Pennsylvania R. R.*, 115 Pa. 140 (1886).

² *Duff v. Allegheny Val. R. R.*, 91 Pa. 458 (1879).

³ *Towanda Coal Co. v. Heeman*, 6 W. N. C. 292 (1878); 86 Pa. 418 (1878).

⁴ *Gillis v. Pennsylvania R. R.*, 59 Pa. 129 (1868).

To persons who go upon a station platform to meet or part with passengers, or who stand in such relation to the company as requires care, the company is bound to have the structure strong enough to bear all who can stand upon it.¹ But a railroad company is not liable to a person who goes upon a station platform merely out of curiosity to see a public official, and is injured by the breaking down of the platform under the weight of the unusual crowd.²

A boy between five and six years of age who was not a passenger, went upon the platform of a station for his own amusement, and stood upon the edge of the platform nearest the track looking at an approaching train. As the train came up it ran along the side of the platform at a rate not exceeding three or four miles an hour, and an iron step which was bent and projected a few inches from the side of the car, caught the boy, and pulled him from the platform under the wheels of the car, so that he was run over and injured. It was held that the company owed no duty to the boy, and that he could not recover for his injuries.³

Infant Trespassers—General Rule.

373. An infant of tender years who is a trespasser on the track of a railway cannot recover for injuries if the alleged negligent act of the company's employees has been without wantonness or malice.

A boy ten years of age crawled under a car which was standing on a public street between two other streets, and stretched himself across the track, with his feet reaching over one of the rails and his head between the rails. The car, with several others to which it was coupled, had been standing on the street for several days. While the boy

¹ *Gillis v. Pennsylvania R. R.*, 59 Pa. 129 (1868).

² *Gillis v. Pennsylvania R. R.*, 59 Pa. 129 (1868).

³ *Baltimore & Ohio R. R. v. Schwindling*, 101 Pa. 258 (1882).

was in the position just described, the car was moved, and the lad was run over and killed. It did not appear that the boy intended to cross the track, and some of the witnesses testified to seeing a pan about half full of coal by his side after the accident. It was held that the deceased's parents were not entitled to recover damages for his death.¹

¹ *McMullen v. Pennsylvania R. R.*, 132 Pa. 107 (1890); *Ogden v. Pennsylvania R. R.*, 23 W. N. C. 191 (1889); *Crawford v. Railroad Co.*, 5 Phila. 359 (1864). Some of the earlier cases in which the parents' contributory negligence in allowing a child to wander upon the track was left to the jury, cannot apparently be reconciled with the more recent decisions.

In *Philadelphia & Reading R. R. v. Long*, 75 Pa. 257 (1874), it appeared that a mother gave her child a piece of bread to satisfy it, closed the kitchen door to keep it in, and went to the next room to scrub the oilcloth on the floor. While she was at work the child in some way escaped from the room and ran out upon the railroad track and was killed. It was held that the question of the parent's negligence was for the jury, and that, under the circumstances, negligence could not be imputed to the mother as a matter of law. "The doctrine which imputes negligence to a parent in such a case is repulsive to our natural instincts, and repugnant to the condition of that class of persons who have to maintain life by daily toil."

A workman employed in a mill went to the mill in the evening, when it was not working, in order to place sand in the furnace, in the performance of his duty. He took his child, nineteen months old, with him and allowed it to wander through the mill while he was working. The child went out of the mill and onto a railroad track, and was killed by a passing train. The train was running at about twenty-five miles an hour, and the evidence was conflicting as to whether a signal was given. An ordinance of the city forbade trains running faster than five miles an hour. If the train had been running five miles per hour, it could not have been stopped after the child was seen. It was held that the father's contributory negligence was for the jury: *Pennsylvania Company v. James and Wife*, 32 P. F. Smith, 194 (1874).

In an action for the death of a child two years old, run over by a locomotive, where the evidence leaves it an open question as to where the child was, and whether the engineer would not have seen it if he had kept a constant lookout, and whether a slower rate of speed would not have enabled him to stop his engine before it came to the child, the case should be submitted to the jury: *Philadelphia & Reading R. R. v. Long*, 75 Pa. 257 (1874).

In an action for injuries to a child it appeared that the defendant company leased land from another company which used it for the purpose of piling and loading lumber, the railroad tracks and canal basin being nearly parallel and in close proximity. The lot lay in Williamsport, adjacent to large saw-mills, where an immense lumbering business was done. In consequence of this business, teams were crossing the lot and hands engaged in handling the lumber, and the public were permitted to

A boy ten years old, strong, healthy, and of more than average intelligence for his years, was sent by his parents upon an errand along a street in the populous part of the suburb of a city on which a railroad track was constructed. The boy walked along the outer ends of the sleepers, and was killed by a passing train, which was moving at a very rapid rate of speed without sounding whistle or bell. There were ample sidewalks and the boy was not required to cross the railroad on his errand at the point where he was killed. The plaintiffs, the boy's parents, were non-suited, and the judgment was affirmed on writ of error.¹

Children of tender age were permitted by their parents to wander around the track of a railroad, when they were

pass to and fro upon it, and along the track where the accident happened a well-worn footpath was plainly visible. Children were often to be found there. The siding upon which the plaintiff was injured left the main lumber track and followed the bend of the canal basin, curving considerably at this point. The plaintiff, a child not nineteen months old, lived with her parents in a small shanty on this lot, occupied without objection by the railroad company, and lying between the main track and siding, at about one hundred and forty-two feet from the place of the accident. The injury took place at about eight o'clock in the morning of a summer day, and was caused by detaching a lumber car propelled in advance of the engine, and sending it around the curve in the siding, on a slight down grade, unattended by a brakeman. After running over the child the car was carried by its own momentum about one hundred and seventy feet beyond the place of injury. At the point on the main track where the main car was detached from the engine to run through the opened switch out upon the siding, the siding where the child was injured was not visible to the engineer or conductor on the engine in consequence of the curvature of the track along the canal basin, and of intervening piles of lumber. The parents of the child were poor, and the mother was employed that morning washing for herself and others. She had gone out over the track to the canal for water, carrying the child on her arm and the bucket in her other hand. Returning she set the child down before a chair with some sugar placed upon it, and engaged again in washing. In three or four minutes she missed the child, which had passed out unobserved. She ran out, called the child, ran around the house and met the conductor carrying the child in his arms. Both of its arms were crushed and had to be amputated. It was held that the company was guilty of negligence and the plaintiff was entitled to recover: *Kay v. Pennsylvania R. R.*, 65 Pa. 269 (1870).

¹ *Moore v. Pennsylvania R. R.*, 99 Pa. 301 (1882).

run down and killed by a detached car. The court held that the parents were guilty of such contributory negligence as to prevent their recovering damages for the death of their children.¹

Plaintiff's child, aged nine, was on a siding some distance from a public street. While hidden behind some standing cars, a train backed in, and the child was run over and killed. It was held that the failure of the engineer to whistle was not negligence.²

A boy between nine and ten years of age, while walking along a railroad track, not at a public crossing, was struck by an unloaded and unattached car immediately after stepping upon the track. It was held that being a mere trespasser, he was not entitled to recover damages from the railroad company.³

Where a child five years old runs in front of a train at a point not a public crossing, and no time is given for the person in charge of the infant to guard against the injury, the plaintiff cannot recover.⁴

A boy ten years of age, when last seen before his death, was walking along a street crossed by a railroad. When next seen he was under a car near the end of a train about a quarter of a square beyond the crossing. There was no evidence as to how the accident happened, or that it happened at the crossing. The train, however, could have been seen at the crossing for some distance. There was evidence that the train was running at a high rate of speed, and that no signals were given. It was held that the non-suit was properly entered.⁵

A boy six years of age was killed on defendants' rail-

¹ *Westerberg v. Kinzua Creek & Kane R. R.*, 142 Pa. 471 (1891).

² *Clark v. Philadelphia & Reading R. R.*, 5 W. N. C. 119 (1878).

³ *Mitchell v. Philadelphia, Wilmington & Baltimore R. R.*, 132 Pa. 226 (1890).

⁴ *Philadelphia & Reading R. R. Co. v. Spearen*, 47 Pa. 300 (1864).

⁵ *Ogden v. Pennsylvania R. R.*, 1 Mona. 249 (1888).

road. Plaintiffs, the boy's parents, resided in a house on a corner lot extending back along a street running at right angles to the railroad. At the intersection of the railroad and the street there was an embankment about eight feet high, on which a flight of steps was constructed for the purpose of more convenient access from the street to the railroad. The back door of plaintiffs' house was about ninety feet from the foot of the steps. The injury was done by a coal train, on the hind car of which two boys, about nine years of age, schoolmates of plaintiffs' son, were riding by permission of the brakeman. As the train approached the steps these boys beckoned to the deceased, who was then standing in the back door of his home. He immediately responded, ran out, reached the top of the steps as the hind car was passing that point, climbed on the car, and, almost immediately thereafter, in attempting to recover his hat, fell under the car and was so badly injured that he died on the same afternoon. It was held that although plaintiffs were not guilty of any contributory negligence, yet they were not entitled to recover, as the evidence of negligence on the part of the railroad company was totally inadequate.¹

A railroad company is not bound by an undertaking of a watchman to see a child of tender years safely across the tracks. If he is not negligent in his duties as watchman, the company is not liable for his failure to get the child safely across the railroad.²

A railroad company, as far as persons on its tracks are concerned, has the right to run its trains at any interval it may choose. It is only for the protection of passengers or property on the trains that the company is required to run its trains at sufficient intervals. A child, therefore,

¹ *Woolbridge v. Delaware, Lackawanna & Western R. R.*, 105 Pa. 460 (1884).

² *Phila. & Read. R. R. Co. v. Spearen*, 47 Pa. 300 (1864).

who recklessly runs between two trains and is injured, cannot complain that the interval between the two trains was too short.

In *Phila. & Read. R. R. Co. v. Spearen*, 47 Pa. 300 (1864), AGNEW, J., said: "It is manifest that it was not the small distance between the engine and the train which was the cause, but the want of discretion in the child. It is the right of the company to run its trains as far apart or as close as it may choose, for its use of its own road is its right. The rule which forbids approximation of trains too closely is for the protection of themselves, and the property and persons they carry, not a rule having respect to those who travel the highway. For them it is sufficient to be warned of the passing train. A passenger upon the train may well complain of a breach of a rule as to distance of interval made for his protection, because its breach contributes to his injury. But here the distance between the engine and the train had nothing to do with the right of those crossing the track. If the traveler has notice and sees the train or engine, it is his duty to stop, if he cannot pass safely. If he sees two trains he must stop till both pass by. He cannot, because one has passed him, throw himself into the very jaws of danger and then claim compensation for his rashness on the ground that the interval was unsafe between the trains themselves."

When Train need not be Stopped.

374. A railroad company is not obliged under all circumstances to stop its train whenever a child is seen upon the track.

A little girl, five years old, was playing on a railroad track. A train approached her at the rate of six miles per hour, and she started to run off, but her foot caught

in a crevice in the track. The engine was at once reversed and the brakes applied, but not in time to avoid injuring the plaintiff. No attempt was made to stop the train until it was seen that the child was held fast and could not escape. The court held that it was for the jury to say whether the train-men were negligent in not trying to stop the train as soon as they saw the child on the track, there being evidence to show that they were misled by plaintiff's attempt to escape.¹

Infant Trespassers on Train.

375. If the railroad company owes no duty of protection to a child of tender years it is not liable for an injury to the child. Thus, where a fireman in charge of an engine asks a boy ten years old to help to connect the engine with a water station, and the boy, in climbing upon the tender, is thrown under the wheels by the jar resulting from other cars coming down with ordinary speed and striking the engine, the company is not liable. In such a case the fireman was acting beyond the scope of his authority to invite the boy to perform the service in which he was killed. AGNEW, J., said: "The true point of this case is that in climbing the side of the tender or engine, at the request of the fireman, to perform the fireman's duty, the son of the plaintiffs did not come within the protection of the company. To recover, the company must have come under a duty to him which made his protection necessary. Viewing him as an employee, at the request of the fireman, the relation itself would destroy his right of action: *Caldwell v. Brown*, 53 Pa. 453; *Weger v. Penna. R. R.*, 55 Pa. 460; *C. V. R. R. v. Myers*, 55 Pa. 288. Had the fireman himself fallen in place of the boy he could have had no remedy. It does not seem

¹ *Pennsylvania Railroad Company v. Morgan*, 82 Pa. 134 (1876).

to be reasonable that his request to the boy to take his place, without any authority, general or special, can elevate the boy to a higher position than his own, and create a liability where none would attach had he performed the service himself. It is not like the case of one injured while on board a train by the sufferance of the conductor, whose general authority extends to receiving and discharging persons to and from the train: *Penna. R. R. v. Books*, 57 Pa. 339. It is not like those cases where an injury happened to boys crawling under the cars to get through a train occupying a public street which they had a right to cross: *Rauch v. Loyd & Hill*, 31 Pa. 358; *Penna. R. R. v. Kelly*, 7 Casey, 372. Nor does it resemble the case of *Kay v. Penna. R. R.*, 65 Pa. 269, decided at Philadelphia last year, where detached cars were sent around a curve, without a brakeman in charge, upon a track which the public had been in the habit of traveling over constantly for a long time with the knowledge of the company, from one part of the city of Williamsport to another. Here the boy was voluntarily where he had no right to be, and where he had no right to claim protection; where the company was in the use of its private ground, and was not abusing its privileges, or trespassing on the rights or immunities of the public. The only apology for his presence there, is the unauthorized request of one who could not delegate his duty, and had no excuse for visiting his principal with his own thoughtless and foolish act. Nor can the mere youth of the boy change the relations of the case. That might excuse him from concurring negligence, but cannot supply the place of negligence on part of the company, or confer an authority upon one who has none."¹

A boy seven years of age who was trespassing on a

¹ *Flower v. Penna. R. R.*, 69 Pa. 210 (1871).

freight car, was ordered off the car by the conductor when the car was in motion. In getting off the boy fell under the wheel, and was injured. It was held that the company owed no duty to the child, and that neither he nor his parents were entitled to recover damages. PAXSON, J., said: "I apprehend few parents would consent to a child's playing upon a railroad track or any other known place of danger. But many parents might neglect the precautions necessary to prevent it. In some instances it would require more than merely to caution a child against it. Positive prohibition followed by punishment for violation may sometimes be necessary. It too often happens that boys are allowed to wander about the streets and trespass upon railroad tracks with very little care or supervision of their parents. Whilst so engaged injuries of this character are likely to happen. Much as they are to be deplored, and however much our sympathies may be aroused for one so injured, it would be unjust to compel a corporation or individual to make a pecuniary compensation for such accident, when it was the result of the lawful pursuit of a lawful business by such corporation or individual. Aside from this the defendant company owed the father of the child no duty. The father owed his child the duty of protection. The company did not."¹

On a second trial of the case, an offer to prove that the car was at the time the plaintiff was forced to jump therefrom, in rapid motion, was rightly refused, as it was a physical impossibility that the car could have attained rapid speed in being moved from one switch to another only a few yards distant. The court said: "All that the conductor did was to order the plaintiff off the car. That was his duty to do. The boys were trespassers, and their removal from the car was not in itself a cause of com

¹ *Cauley v. Pittsburgh, Cincinnati & St. Louis Ry.*, 95 Pa. 398 (1880).

plaint. Was there anything in the manner of their removal which would render the defendant company liable in damages? The plaintiff was not thrown off. He was not touched by the conductor or any railroad employee. He was told to get off a sand car which was being shifted from a siding to a switch a few yards distant. Had the conductor any reasonable grounds to believe that when he told the boys to get off that any of them would be injured in doing so? Before the company can be held liable it must appear that the injury to the plaintiff was the natural and probable result of the conductor's order; such a consequence as he might and ought to have foreseen at the time."¹

Contributory Negligence Cannot be Imputed to Child.

376. No contributory negligence can be attributed to a child of tender years.²

A child of tender years was taken into the arms of a person to whose care it had not been intrusted, and by the negligence of such person was injured by an engine. It was held that the railroad company was not relieved from liability, it appearing that those in charge of the engine had also been negligent.³

Presumption as to Infant's Understanding.

377. An infant of fourteen is presumed in law to have sufficient capacity and understanding to be sensible of danger, and to have the power to avoid it; and this presumption stands until it is overthrown by clear proof of the absence of such discretion and intelligence as is usual with infants of fourteen years of age.⁴

¹ *Cauley v. Pittsburgh, Cincinnati & St. Louis Ry.*, 98 Pa. 498 (1881).

² *North Penn. R. R. v. Mahoney*, 57 Pa. 187 (1868).

³ *North Penn. R. R. v. Mahoney*, 57 Pa. 187 (1868).

⁴ *Nagle v. Allegheny Valley R. R.*, 83 Pa. 35 (1878).

CHAPTER XXXI.

NEGLIGENCE—INJURIES TO EMPLOYEES.

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Suitable Tools and Appliances.

378. A railroad company is bound to provide suitable and safe tools and machinery for its servants.

A brakeman upon a train of cars lost his footing in consequence of the snapping of the chain of the brake, which he was tightening, and was thrown to the ground and killed. The court held that plaintiff was entitled to recover. The court said: "A chain is no stronger than the weakest link in it. There was evidence that the link which broke was not in the coil of the chain welded in the factory, but was put in afterward at the repair shop of the company. It matters not, therefore, how strong or per-

fect the other parts of the chain were. This link was weak and imperfect and the breaking thereof caused the injury. Running a train of seventy-five loaded cars down a grade of about one hundred and eighty feet required a chain of undoubted strength to tighten the brake. The company was bound to exercise reasonable care in procuring good and strong chains and in maintaining and repairing them. The verdict establishes they did not do the latter."¹

Where an engineer and fireman are killed by the explosion of the boiler of a locomotive which had recently come from the repair shops of the company, and had been insufficiently repaired, the railroad company is liable.²

If a brakeman is sent over a portion of a railroad which is unfamiliar to him, on a dark night and without warning as to low bridges, the company is liable for resulting injuries.³

Perishable Appliances.

379. The duty which the master owes to his servants is to provide them with safe tools and machinery where that is necessary. When he does this he does not, however, engage that they will always continue in the same condition. Any defect which may become apparent in their use it is the duty of the servant to observe and report to his employer. The servant has the means of discovering any such defect which the master does not possess. It is not negligence in the master if the tool or machine breaks, whether from an internal original fault, not apparent when the tool or machine was first provided, or

¹ Philadelphia & Reading R. R. v. Agnew, 11 W. N. C. 394 (1882).

² Pennsylvania & N. Y. Canal & R. R. Co. v. Mason, 109 Pa. 296 (1885).

³ Davis v. Pennsylvania R. R., 5 Pa. C. C. R. 567 (1888).

from an external apparent one produced by time and use not brought to the master's knowledge. These are the ordinary risks of the employment which the servant takes upon himself. But a different rule prevails where the tool or machinery is perishable. In such a case the master is bound to know that such tool or machinery will only last a limited time, and it is his duty to renew instruments of this character at proper intervals.¹

An employee of a railroad company was killed while at work by the breaking of a rope on a derrick belonging to the company. The rope was about two inches thick, and there was every reason to believe that it was originally sufficiently strong for the purpose for which it was used. But there was evidence that the derrick was an old structure, and the rope at the time of the accident had been in use two or three years, perhaps more. During this time it had been exposed to the weather. Several witnesses who examined the rope immediately after the accident testified that at the place where it had broken it was rotten and unsafe, and there was evidence that such was commonly the result of the exposure of such a rope to the weather, for that or a much shorter period of time. It was held that the question of the company's liability was for the jury.²

Where Evidence is Conflicting as to Safety of Appliance.

380. Where the evidence is conflicting as to whether an implement provided by the master is reasonably safe, the cause must be submitted to the jury.

Plaintiff was employed by the defendant, a railroad company, in the work of shifting and making up trains. Previous to the accident, he had done this work only five

¹ *Baker v. Allegheny Valley R. R.*, 95 Pa. 211 (1880).

² *Baker v. Allegheny Valley R. R.*, 95 Pa. 211 (1880).

or six times. In order to shift the trains, it was his duty to join the engines and car by using a pole about six feet long and four inches square by placing one end in the socket in the front of the engine and the other against the bumper on back of the car, so that the pole ran diagonally across the space between the engine and car and was kept in position by the pressure against it in moving the car. The poles used by shifters at the time of the accident usually had upon them a handle about eighteen inches long, placed in the middle of the pole, so that a man standing in the space between the engine and the car might lift the pole from its bearings at the time the engine stopped. This handle had been used for about eight or nine years, but before that time all poles were without them. There was some evidence that a pole without such handle was unsafe for use, but the testimony upon this point was conflicting. On the night in question, which was very dark, plaintiff placed the pole in position, and then, having signaled the engine to start, jumped on the step of the engine, because of snow, which was piled up between the tracks and did not permit him to run alongside of the cars, as it was usual for the shifters to do. He testified, "I jumped on to the step, and when we got to the place to stop, I gave signal to stop, and put my hand out to get hold of pole, to the middle of the pole to balance it. There was no handle, and I put my hand underneath and tried to throw the pole away. I didn't know up to that time it hadn't any handle on it. Soon as I reached for it and could not get it, one end of the pole slipped before the other one. The other end flew toward me, struck my knee and knocked it against cab of engine." The case having been submitted to the jury a verdict and judgment for the plaintiff was affirmed.¹

¹ Philadelphia, Wilmington & Baltimore R. R. v. Keenan, 103 Pa. 124 (1883).

Continuing in Unsafe Employment.

381. If an employee knows a car or appliance is unsafe to handle in the ordinary manner, he should refuse to put himself in the dangerous position; but having done so, he assumed the responsibility, and the consequence of an accident cannot be charged to his employer.¹

A flagman who attempts in the night time to board a car having a defective step, which he knew about, and while the train is in motion, assumes the risk, and this is especially the case where the flagman had authority to stop the engine.²

A brakeman who has knowledge that an overhead bridge is of insufficient height and continues in his employment, cannot recover damages from the railroad company if he is injured by being struck by the bridge. "Where a railroad company negligently plans an obstruction over its roadway, dangerous to the lives of its employees, it fails in its duty to them, and therefore if a person enters the service of the company, in ignorance of such danger and remains ignorant thereof until injured or killed by it the company is liable for damages. But if the employee had knowledge of the nature and degree of the peril when he entered the service, after such knowledge without protest and promise of amendment, the case is different. The employer has no right to subject his employee to an unnecessary peril without his consent; but it is well settled in the courts of this country and in England, that if a servant chooses to enter into an employment, involving danger of personal injury which the master might have avoided, he takes upon himself the risk of all the hazards incident to the employment, the existence and nature of which were known to him when he entered the service,

¹ *Barkdoll v. Pennsylvania R. R.*, 4 Montgomery County L. Rep. 69 (1888).

² *New York, Lake Erie & Western R. R. v. Lyons*, 119 Pa. 324 (1888).

and which he had no reason to expect would be obviated or removed. If a servant accepts service with a knowledge of the position of structures from which he has occasion to be apprehensive of injury, he cannot require the master to make changes so as obviate the danger, or hold him liable for damages in case of injury. By continuing in the master's service, after being fully apprised of its dangerous character, the servant takes upon himself all risks incident to such service."¹

If a person voluntarily assumes a continuous service, and becomes exhausted and falls asleep at his work and thereby suffers injury, he cannot recover from his employer.²

While a railroad company is bound to provide for its servants suitable and safe machinery and instrumentalities for the performance of their work, the servant is also required to exercise ordinary prudence. If the instrumentality by which he is required to perform his service is so obviously and immediately dangerous that a man of common prudence would refuse to use it, the master cannot be held liable for the resulting damage. In such case the law adjudges the servant guilty of concurrent negligence, and will refuse him that aid to which he otherwise would be entitled. But where the servant, in obedience to the requirement of the master, incurs the risk of machinery, which though dangerous, is not so much so as to threaten immediate injury, or where it is reasonably probable it may be safely used by extraordinary custom or skill, the rule is different. In such case the master is liable for a resulting accident.

Plaintiff offered to prove that he was employed as conductor of freight trains on the Pittsburgh & Connellsville Railroad; that defendants had in their use and

¹ Per TRUNKEY, J., in *Brossman v. Lehigh Valley R. R.*, 113 Pa. 490 (1886).

² *Nattress v. Philadelphia & Wilmington R. R.*, 150 Pa. 527 (1892).

occupation a switch, siding, or branch road near the Pittsburgh depot of said road, on which coal cars were to be run out in order that the coal might be emptied on a platform, and that it was the duty of the conductor to run out coal cars which he had brought down with his train, on said switch, siding, or branch, that the said coal might be emptied on said platform. That by reason of the shortness of curve on said road or branch, and the improper construction of the frog, or connection with the main track, it was hazardous and dangerous to run said coal cars out on said switch or siding, and that the plaintiff had notified the superintendent of the railroad, also the foreman of the road of the said hazard and danger, and that the superintendent and foreman promised to repair the same so as to avoid the hazard and danger, requesting the plaintiff to continue his work, observing proper care, until the defects could be remedied. That neither the superintendent nor any one else took any steps to repair said defects, and while plaintiff was running part of his coal cars over said switch, with brakemen on the train in June or July, 1869, using due care, the front car of the train, in consequence of the shortness of the curve, was forced from the track and fell to the ground. That the plaintiff, who was on the second car from the fore end of the train, which was also forced from the track, was, in consequence of the shock to the car in which he was, thrown down from the track a distance of about twenty feet, and very seriously injured. It was held that the evidence should have been admitted.¹

Position of Sudden Peril.

382. If an employee is placed suddenly in a position in which he is compelled to use a defective tool, with-

¹ *Patterson v. Pittsburgh & Connellsville R. R.*, 76 Pa. 389 (1874).

out having any opportunity to know of the defect until he actually uses the tool, he may recover from his employer damages for an injury sustained by reason of the defect.

Deceased was a brakeman employed in shifting cars; he had uncoupled the car, and had hold of the brake at the front end of the car. In this situation he fell and was run over by a car and killed. No one saw him in the act of falling, but he was at his post and had one arm around the lever, and was holding or working the brake the moment before he fell. The whole time from the commencement of the movement of the car to the occurrence of the accident was but two or three minutes. There was evidence that the brake could be used with safety if only a moderate application of power was made, but that the lever by which the brake was worked had a tendency to slip up off the shaft when a strong pressure of the brakes on the car wheels was required. The court held that it would be subjecting the brakeman to a too rigid measure of responsibility to say, as a matter of law, that in so very short an interval, and with his attention necessarily given to the uncoupling of the cars and also to the regulation of their movement, he was bound to acquire a knowledge of the defect in the brake or to abstain from its use. The case was accordingly one for the jury. GREEN, J., said: "Nor can it be said that this was a case in which the employee was better acquainted with the defect than the employer, and should have given information of it and abstained from using it. The evidence fails entirely to show such a state of facts. If it had shown them, we would not hesitate to apply the rule of contributory negligence. But here the testimony was very abundant that the company enforced a system of daily inspection of all cars at the place of this accident,

and if this had been thorough, the defect in this brake should have been discovered. As to the deceased, there is no evidence that he ever handled or even saw this brake until he attempted to use it on this occasion. In such circumstances it would not be proper to visit him with the consequences of a knowledge of the defect, and a voluntary use of the brake notwithstanding such knowledge. The question of Huber's knowledge of the condition of the brake and of the manner in which he used it, whether negligently or otherwise, was very carefully and correctly left to the jury, and by the verdict it has been found that he was not negligent.

"We cannot say from a reading of all the testimony that it so conclusively appears he was negligent as to convict the court of error in submitting that question to the jury. It is one thing for a number of witnesses to say in court, with the brake before them and ample opportunity to examine the condition of the lever at the place where the shaft entered it, that the opening of the shaft in the lever was too large, and that the lever might slip off the shaft when it was used to apply the brakes, but it is quite a different thing for a brakeman who jumps on the car which is immediately started to be shifted who must at once uncouple the car in front of him and then regulate the movement of the car he is on by applying the brakes to stop to examine the condition of the machinery of the brake before he uses it without his attention being called to any defect. In point of fact the car had almost reached its destination on the scales when Huber fell off, so that it would seem he did use the brake successfully for much the larger part of the distance. It is not for a court to say as matter of law, in such circumstances, that the brakeman was necessarily guilty of negligence in not discovering the defect in the machinery of the brake and

ceasing to use it. That was the proper function of the jury."¹

Safe Road-Bed.

383. A railroad company is bound to furnish a safe and sufficient roadway for its servants as well as others traveling over it. Thus, if a rail breaks, owing to its resting upon rotten ties, and an employee is injured, the railroad company is liable. The remote negligence of servants will not exclude the company for neglecting to maintain a proper substructure for carrying its rail. "Casualty from such a cause is not one of those ordinary perils which presumptively every one incurs who takes service with the company. It is not to be likened to the breaking of a rail from frost or mere accident, or from some cause immediately traceable to the negligence of another employee. It would be a cruel exposure of life to hold such a casualty to be an ordinary risk of the service, and it would extend a license to negligence on the part of those whose duty it is to be careful of human life."²

Under the rules of a company, a conductor was required to stay in about the middle of a freight train when it was going down-grade, so as to be able to properly direct the brakeman. The deceased, who was a conductor of the freight train, as his train started down a grade, went forward to the engine and told the engineer to run slow and look out for a certain iron company's engines, which were liable to come out of their limits. While giving this direction to the engineer, the engine and some of the forward cars were thrown from the track, owing to a defect in the road-bed, and the conductor was

¹ Philadelphia & Reading R. R. v. Huber, 128 Pa. 63 (1889).

² Per AGNEW, J., in O'Donnell v. Allegheny Valley R. R., 59 Pa. 239 (1868).

killed. If he had remained in the middle of the train he would probably not have been injured. The court refused to charge, as a matter of law, that the deceased was guilty of contributory negligence, holding that while he was bound to a reasonable observance of rules, still, he had a general discretion to use his judgment for the safety of his train in case of emergency.¹

Deceased was a brakeman who had been employed for several years in defendant's yard. He was directed to take a train of gondola cars, loaded with lumber and pushed by an engine in the rear, to some other cars on the siding. He put his left foot on the iron stirrup at the right-hand side of the front end of the front car, his right foot on the bumper, and one of his arms over the side of the box of the car to hold himself on, and rode in that position until the front car became derailed, and the front end of it, veering to the right, caught him between a board-pile and the car, and so injured him that he died. The derailment of the car was apparently due to a defective road-bed. It was held that the court could not say, as a matter of law, that the deceased was guilty of contributory negligence. The case was submitted to the jury, and a verdict and judgment for plaintiff was sustained.²

If it appears that a brakeman was injured in an accident which was the result of running a loaded freight car upon a siding where the rails were put down without fish-plates it is proper to submit the question of the company's negligence to the jury.³

If a railroad company places a large quantity of dynamite so near its track as to be exploded by a passing train

¹ *Somerset & Cambria R. R. v. Galbraith*, 109 Pa. 32 (1885).

² *Pennsylvania R. R. v. Zink*, 126 Pa. 288 (1889).

³ *McCombs v. Pittsburgh & Western Ry.*, 130 Pa. 182 (1889).

the company is liable in damages for an injury to one of its employees caused by the explosion of the dynamite. The company is bound to know the character of the material which it places in the hands of its agents.¹

Presumption of Negligence.

384. There is no presumption of negligence on the part of a railroad company where an accident occurs to the employee, and the latter must prove affirmatively the fact of negligence as violating the special and limited duty of the employer to the employee. The mere fact of a collision does not make out even a *prima facie* case against the defendant.

The evidence of the plaintiff showed that the plaintiff's husband was injured, and afterward died from his injuries, while in the discharge of his duty as a fireman in the employ of the defendant. He was proceeding north with his train on a single track of the defendant company's road between New York and Emigsville, and was injured in a collision with freight train No. 158, proceeding south. The train No. 155, upon which plaintiff's husband was fireman, had the right of way, and was some two hours behind time. The rule of the company regulating the running of its trains and its time-table offered in evidence by the plaintiff established the right of way claimed for No. 155, and the further fact that the fellow-workmen of deceased proceeded with their train, No. 158, south on the single track, in violation of the rules and time-table, and that this resulted in the collision of trains. Had the south-bound train remained on the double track, at the summit, a short distance further north, until the north-bound train passed, as was required by the rules, the collision would have been avoided. There was no evidence

¹Tissue v. Baltimore & Ohio R. R., 112 Pa. 91 (1886).

showing or tending to show special orders for the moving of these trains or either of them upon the single track upon which they met, from the train dispatcher or other agent of the company. It was held that judgment of nonsuit should be entered.¹

In an action for a death, it appeared that the deceased was, at the time of the accident, and had been for years prior thereto, a brakeman in the employ of the company. On the night of the injury, he was engaged in coupling and uncoupling the cars of a freight train. While so engaged, in some manner unexplained to the jury, he fell under the wheels of the tank or tender of the locomotive, which passed over one of his legs, producing the injury complained of. As to how he fell, or the cause of his falling, there was no evidence. The theory of the plaintiffs was that his fall was occasioned either by the roughness or inequalities of the track, or in an attempt to get out the tank; the allegation being that the step was defective, and that he missed his footing because of such defect. It appeared from the evidence that the track at the particular point where the accident occurred was in the course of being repaired; that it had been raised a few inches, and that the space between the ties had not been ballasted or filled in; that as regards the step, it was not defective in its construction, but, as plaintiffs alleged, was not in the position it should have been to insure the greatest amount of safety. As to this point, the plaintiffs' own evidence was evenly balanced, while it was not denied that the deceased had used the step for a year without complaint to the company, and that if he had made objection to it, the rule or practice of the company required to be changed to suit the crew operating the engine, of which the deceased was one. It was held that there was

¹ *Cole v. Northern Central R. R.*, 12 Pa. C. C. R. 573 (1892).

not sufficient evidence of the defendant's negligence to submit to the jury.¹

Plaintiff while running a train of cars was injured by the train breaking through a bridge which had been recently constructed. The evidence established the fact that the breaking of the bridge was caused by the defective welding of a bolt, which was done in the workshop of the defendant company. The defect was not discoverable by the eye or from the outside appearance. The workmen who had been engaged upon the bridge had the reputation of being good and competent men. It was held that plaintiff was not entitled to recover.²

Where a brakeman, while operating a shunting appliance on a shifting engine, is injured, there can be no recovery if there is nothing to show that the company was negligent in using the shunting appliance.³

The mere fact of an accident, even when connected with the means of transportation, does not raise any presumption of negligence on the part of the railroad company.⁴

Plaintiff's intestate was a locomotive engineer in the employ of the defendant company. One morning about five o'clock, when it was still dark, he was seen upon the seat at the right side of the locomotive cab, while the train was going west. When next seen he was lying on the floor of the cab on his back, face upward, with his head near the feet of the brakeman and his skull fractured. The accident occurred near the east end of a siding. On this siding, the evening before, there was a box car, some two hundred and seventy-five feet from the switch. On the following morning this car was near the switch, at the

¹ Philadelphia & Reading R. R. v. Schertle, 97 Pa. 455 (1881).

² Peck v. Delaware & Hudson Canal Co., 5 Kulp, 409 (1889).

³ Hartman v. Pennsylvania R. R., 144 Pa. 345 (1891).

⁴ Philadelphia & Reading R. R. v. Hughes, 119 Pa. 301 (1888).

east end of the car, at a point where the rails of the side track were four feet eight inches from the rails of the main track. There was no evidence as to how the car came to be in this position. The track of the siding was nearly on a level, and the evidence showed that an ordinary freight car projects over the rails about one foot and ten inches. As to how far a locomotive cab thus projects, it did not clearly appear. It was held that there was no sufficient evidence of defendant's negligence to sustain the action.¹

The fireman of a locomotive was killed by the locomotive running off the track at a curve. It was alleged that the track was defective. Two civil engineers who examined the track testified to slight variations from two to three degrees in the curve, but that several months afterward they found the road in good condition and the curves more regular. They further testified that the road at the place of the accident was ballasted with dirt instead of gravel. It was held that the evidence was insufficient to show such negligence on the part of the company as would warrant a recovery against it for the death of the employee. In such a case the mere fact of the accident would not as in the case of a passenger raise a presumption of negligence which the company would be bound to rebut.²

Protection of Infant Employees.

385. It is the duty of employers of infants to take notice of their age and ability, and to use ordinary care to protect them from risks which they cannot properly appreciate, and to which in the course of their employment they should not be exposed.

¹ *Ballard v. New York, Lake Erie & Western R. R.*, 126 Pa. 141 (1889).

² *Erie & Wyoming Valley R. R. Co. v. Smith*, 125 Pa. 259 (1889).

Plaintiff, a lad under thirteen years of age, was injured while employed by defendant in picking slate from the top of loaded cars. Defendant and another railroad company loaded their coal into separate cars at certain shutes. From four to six hundred cars daily were run by gravity to the scales, a short distance below the shutes, and after being weighed were dropped down the track to a point where they were made up into trains. On the way down it was necessary to separate the cars loaded for defendant from those of the other company. As the cars were thus being moved and made into separate trains, plaintiff and other boys, employed by defendant, were engaged on the top of the loaded cars picking out the slate. While plaintiff was thus at work on the second car from the rear one of a section, another car came down the track, struck the cars in front, and suddenly drove them forward. When the collision occurred, plaintiff was in a stooping position, and, losing his balance, fell between the cars and was injured. The testimony as to whether plaintiff had been informed of the dangers incident to the employment was conflicting. Several witnesses testified that the occupation was an exceedingly dangerous one for a boy of plaintiff's age. It was held that the case was for the jury.¹

Continuous Service.

386. A brakeman cannot recover damages from the railroad company caused by the negligence of the conductor on the ground that the conductor was ill, and unfit for duty by reason of excessive and continuous service, if it appears that the negligent act was not the result of the conductor's illness.²

¹ *Fisher v. Delaware & Hudson Canal Co.*, 153 Pa. 379 (1893).

² *Johnston v. Pittsburgh & Western R. R.*, 114 Pa. 443 (1886).

Train Operated on Another Railroad.

387. Where a crew employed by one railroad is operating a train on the railroad of another company, but under no orders or control of the second company, the first company is liable for any negligent act of the crew.¹

Risk of Employment—General Rule.

388. If a railroad company voluntarily subjects its employees to dangers which it ought to provide against, and an accident happens to an employee from a want of proper provision against such dangers, the company is liable. But, on the other hand, it is not liable for an accident happening from the ordinary risks and dangers of the business, for it is a legal presumption that the servant assumed the risk of such accidents when he entered the service of the company.²

Conductor.

389. Deceased was a conductor on a freight train on the defendant company's road. The trains were drawn up incline planes by stationary engines operating endless ropes. The duty of deceased was to unhook the sling chain which hooked the chain to the endless rope, ring the bell to notify the engineer, and go on the car again so as to control the brake if necessary. The train moved a little faster than a man could walk, and there was no difficulty in going on or off. In going down the level, deceased, at the time of the accident, was not looking ahead, and his train collided with another train ahead of him, and he was thrown off and injured. The deceased had been employed at this work for seventeen years and was entirely familiar with it. It was held that there was

¹ Pennsylvania R. R. v. McHugo, 3 Walker, 469 (1876).

² Pittsburgh & Connellsville R. R. v. Sentmeyer, 92 Pa. 276 (1880).

no evidence of the company's negligence, and the deceased was not entitled to recover.¹

A freight conductor, engaged for many years in switching trains on a section of a railroad, took his seat on the pilot of a shifting engine, and while seated there the engine came in collision with a wagon at a public crossing where no watchman was stationed by the railroad company. One of the horses attached to the wagon fell upon a flag-staff of the engine and struck the conductor, knocking him off and killing him. The evidence showed that the conductor had gone to the pilot to give some instructions to the brakeman. It was held that the deceased assumed the risk of his employment and that the company was not liable for his death.²

Brakeman.

390. Where a brakeman continues to use without complaint for over three years a brake of a peculiar kind, he will be presumed to know any danger connected with its use and to have assumed the risk.³

Plaintiff's intestate, a brakeman, was killed while engaged in coupling cars on a work train, by having his head caught and crushed between the ends of certain bridge irons, which projected beyond the ends of the gondola cars on which they were loaded. He had been employed by the company for similar work at different times, during the preceding two years, and on the day of the accident he was detailed at his own request by the conductor of the train to couple cars. There was evidence that the regulations of the company, which were known to the deceased, required persons in coupling cars to stoop, and

¹ *Moules v. Delaware & Hudson Canal Co.*, 141 Pa. 632 (1891).

² *Rumsey v. Delaware, Lackawanna & Western R. R.*, 151 Pa. 74 (1892).

³ *Philadelphia & Reading R. R. v. Hughes*, 119 Pa. 301 (1888).

to make the coupling from beneath by reaching up. The conductor of the train testified that he gave similar instructions to the deceased as to the mode of coupling, and that if he had complied with them, the accident would not have happened as it did. It was held that the case should not have been submitted to the jury, as the evidence disclosed merely an ordinary risk of the employment, which the employee assumed when he engaged in the service of the company.¹

Plaintiff, a brakeman, was injured by a projecting iron rod which extended several inches beyond its proper position at the end of a car. The evidence showed that plaintiff had no knowledge of its presence and no opportunity to discover it. Plaintiff testified that while he was coupling the cars he was struck by the projecting rod and injured. The projecting rod was conspicuous and was found at once after the accident. The evidence also showed that there was a thorough and adequate system of constant inspection maintained by the company, and there was no proof that the defect was known to any of the persons engaged in the service. It was held that the injury which plaintiff received was the result of one of the risks of his employment, and that he was not entitled to recover.²

Plaintiff, a brakeman, was injured by the breaking of the shaft of a brake while he was turning the wheel. The brake was constructed in the usual way. A hole had been drilled in the shaft probably for a pin to hold the ratchet wheel. On one side of this hole an old brake was discovered which was not observable before the accident, and the hole itself was not visible from the ground. The car inspector testified that it was not

¹ Northern Central Railway Co. v. Husson, 101 Pa. 1 (1882).

² Mensch v. Pennsylvania R. R., 150 Pa. 598 (1892).

customary to mount cars *en route* to inspect them, with reference to their brakes, and that he did not do so in the present case. The court refused to strike off a nonsuit.¹

An iron company erected a bridge over a railroad. At the time the bridge was built there was ample space between the top of the cars and the bottom of the bridge. In course of time the railroad company began to use higher cars and a brakeman was injured while on the top of a car passing under the bridge. It was held that the brakeman could not recover damages from the iron company.²

A brakeman was killed by a broad-gauge car upon a narrow-gauge truck suddenly leaving the track while rounding a curve. It appeared that the carriage of broad-gauge cars upon narrow-gauge trucks was a part of defendant's ordinary business, and cars like the one upon which the deceased was riding had been frequently used, and the brakeman was familiar with cars of this kind. It was held that the deceased accepted the risks of his employment upon such cars, and that his wife was not entitled to recover damages for his death.³

Flagman.

391. Plaintiff's intestate had been employed as a flagman for several months prior to the time when he was killed by being struck by an overhead bridge. The evidence showed that the bridge was fifteen feet and six inches in height from the top of the railroad rails, whilst the height of the cars varied from nine to ten and one-half feet. For the lower cars the bridge was sufficiently

¹ Donaghy v. Philadelphia & Reading R. R., 21 W. N. C. 154 (1887).

² Stonebach v. Thomas Iron Co., Lehigh Valley Rep. 17 (1885).

³ Titus v. Bradford, Bordell & Kinzua R. R., 136 Pa. 618 (1890).

high to permit a man to stand erect on the top of a car without danger, but for the higher cars it was several inches too low. It was held that the plaintiff's intestate assumed the risk of riding upon the top of the car where his duty called him, and that the company was not bound to guard him from merely possible dangers.¹

Plaintiff was flagman of a freight train. His position was on the rear car of the train. The rear car of the train on which he was working was a box-car with a door cut in each end like a caboose. The train consisted of from fifty to sixty cars, with an engine in front and two pushing engines immediately behind the rear car. When the car passed the summit of the mountain it was plaintiff's duty to uncouple the pushing engines and hang out a red light. Plaintiff's testimony was in substance that while engaged in the performance of this duty he had two lanterns in his right hand, and, leaning with his right hand against the jamb of the door, stooped to pull out the pin which coupled the engine with the box-car, or caboose; and after uncoupling it, and while in the act of rising up to go and hang out the red light, the train, in crossing the summit, gave a jerk caused by the front engine taking up the slack of the train, when he was thrown from the car to the engine, fell to the ground, and both engines passed over his leg, which was crushed and had to be amputated. The alleged negligence of the company was in not providing a suitable caboose. The evidence showed, however, that such box-cars were in common use, as cabooses, not only on this road, but on other roads. The court held that plaintiff had accepted the risk incident to his employment on such a car and was not entitled to recover.²

¹ *Pittsburgh & Connellsville R. R. v. Sentmeyer*, 92 Pa. 276 (1879).

² *Davis v. Baltimore & Ohio R. R.*, 152 Pa. 314 (1893).

Trackman.

392. A trackman, employed to repair tracks at a point where gravel trains, with engines reversed, were being constantly run, takes the risk of his employment, and if he is killed by such a train the railroad company is not responsible.¹

Car Repairer.

393. A car repairer employed in a railroad yard assumes the risk of injuries from the negligent dropping in of cars on the tracks where he is from time to time at work.²

Car Washer.

394. Plaintiff, who was a German without knowledge of the English language, was employed as a car washer. On a certain day he was summoned from this employment to help load car wheels on flat cars. The wheels were rolled up onto the cars upon skids. After loading four or five pairs of wheels, a pair part way up turned and rolled back. One of the workmen gave an alarm in English which the plaintiff did not understand. Plaintiff's companion stooped down and avoided the wheels, but plaintiff started to run, and stumbled and fell over an iron rod of the skids. The court held that the plaintiff had assumed the risk of his employment, and that he was not entitled to recover.³

Contributory Negligence of Employee.

395. If an employee is guilty of contributory negligence, he cannot recover from the company. Thus,

¹ *Kennedy v. Pennsylvania R. R.*, 1 Mona. 271 (1889).

² *Campbell v. Pennsylvania R. R.*, 2 Atl. Rep. 489 (1886).

³ *Golwitzer v. Pennsylvania R. R.*, 1 Mona. 72 (1889).

where an employee of a railroad company negligently and without excuse places himself within a position of known danger on a car of the company, and thereby suffers an injury, he cannot recover damages for the injury sustained. Plaintiff's intestate, an employee of the defendant company, while riding from his work on a train composed of an engine, tender, and a gondola car fitted up with plank seats, sat on the narrow platform in the rear end of the tender, with his legs and feet hanging over the edge. The gondola car stood upon a truck eleven inches higher than the tender, so that, in the event of a slight collision, the truck of the gondola was liable to mount and ride upon the truck of the tender. Plaintiff had been previously warned of the dangerous place where he was riding. While he was thus sitting, an engine ran into the gondola car, raised it up and pushed it forward, so that its bumper struck him, and so injured him that he died. It was held that the deceased was guilty of contributory negligence, and that plaintiffs, his widow and children, were not entitled to recover.¹

Plaintiff, a boy over fifteen years of age, was employed by a railroad company. In trying to get on a moving engine he was struck by the handle of the switch, knocked under the tender of the engine, and injured. It appeared that he could have stepped over the back of the tender or around its sides, and thus reached his place upon the engine in safety. It was held that he was guilty of contributory negligence, notwithstanding his youth.²

If a flagman rides upon the top of a freight car at a time when his duty does not require him to do so, and there is a caboose on the train where he may ride with safety, he cannot recover from the company damages for

¹ *Lehigh Valley R. R. v. Greiner*, 113 Pa. 600 (1886).

² *Hausman v. Cornwell R. R.*, 3 Lancaster L. Rep. 257 (1886).

an injury caused by his being struck by an overhead bridge.¹

Where a trackman in charge of a hand-car approaches on a dark night a station where a train is standing, and is injured by the train backing and colliding with the hand-car, he is guilty of contributory negligence.²

Employment of Incompetent Servants.

396. A railroad company is not liable in damages to an employee for injuries caused by the negligence of a fellow-servant; but if there be any fault in the selection of the other servant, or in continuing him in his place after he has proved incompetent, the master will be answerable for the injury.³

Evidence of the intemperate habits of a conductor charged with negligently colliding with another train is properly admissible. Where the habit of intoxication in a conductor is shown it raises, in the case of an accident, a presumption of negligence, which stands until it is rebutted.⁴

If the superintendent of a railroad company who possesses general powers and management employs a conductor whom he knows to be intemperate and unfit for the position, the railroad company is liable for an injury caused to one of its employees by the negligence of the conductor.⁵

Evidence tending to show that a telegraph operator is not qualified for the place he occupied is not sufficient to

¹ Pittsburgh & Connellsville R. R. v. Sentmeyer, 92 Pa. 276 (1880)

² Catawissa R. R. Co. v. Armstrong, 49 Pa. 186 (1865).

³ Weger v. Pennsylvania R. R., 55 Pa. 460 (1867).

⁴ Pennsylvania R. R. v. Books, 57 Pa. 339 (1868); Huntingdon & Broad Top R. R. v. Decker, 82 Pa. 119 (1876).

⁵ Huntingdon & Broad Top Mountain R. R. & Coal Co. v. Decker 82 Pa. 119 (1876).

charge the company with negligence in employing him or in retaining him in its service. It should also appear that the company knew, or in the exercise of reasonable diligence should have known, that he was incompetent to discharge the duties of the position to which he was assigned.¹

Where an accident is caused by the negligence of an intemperate conductor evidence of the efforts made by the company to secure competent train hands is inadmissible. It is no justification or excuse to the company in employing an incompetent or intemperate man that hands are scarce.²

Where an accident occurs to an employee in the transportation department by the negligence of a fellow-servant and it is claimed that the company was careless in the employment of the person whose negligent act caused the injury, it is competent to show that the officer having charge of this department did not know that the person employed was careless and inefficient. Such officer represents the company, and his knowledge is that of the company.³

Where in an action by an employee for personal injuries caused by the negligence of a fellow-servant, it was charged that the company was careless in the employment of the fellow-servant, the character of such employee must be proved by evidence of general reputation and not of special acts. "Character grows out of special acts, but is not proved by them. Indeed, special acts do very often indicate frailties or vices that are altogether contrary to the character actually established. And sometimes the very frailties that may be proved

¹ *Reiser v. Pennsylvania Company*, 152 Pa. 38 (1892).

² *Pennsylvania R. R. v. Books*, 57 Pa. 339 (1868).

³ *Frazier v. Pennsylvania R. R. Co.*, 38 Pa. 104 (1860).

against a man, may have been regarded by him in so serious a light, as to have produced great improvement of character. Besides this, ordinary care implies occasional acts of carelessness, for all men are fallible in this respect, and the law demands only the ordinary."¹

Notice of the incompetency of a telegraph operator given to the chief train dispatcher of a railroad is not sufficient to charge the company when it appears that the dispatcher had no power to employ or discharge operators.²

In an action to recover damages for injuries caused at a grade crossing to a person in the position of a fellow-servant of the company's employees, it is improper to admit evidence that the flagman had the reputation of being a careless person, and incompetent for the place. He may have had a very bad reputation, and yet have discharged his duty faithfully at the time of the accident.³

Where a railroad company employs a servant known to be unfit for the business, and another employee is injured by the negligence of such servant, the company is liable for the injury; but if the person injured knew that the servant was habitually careless, and chose to continue in service with him, and did not inform the company of his known acts of carelessness and refused to serve with him, he can have no claim against the company for injuries suffered from further carelessness, even if the company also knew.⁴

Fellow-Servants—General Rule.

397. Employees under the same master engaged in the same common work, and performing duties and services for the same general purposes, are fellow-servants. The

¹ LOWRIE, C. J., in *Frazier v. Pennsylvania R. R. Co.*, 38 Pa. 104 (1860).

² *Reiser v. Pennsylvania Company*, 152 Pa. 38 (1892).

³ *Baltimore & Ohio R. R. v. Colvin*, 118 Pa. 230 (1888).

⁴ *Frazier v. Pennsylvania R. R. Co.*, 38 Pa. 104 (1860).

rule is the same, although the one injured may be inferior in grade, and is subject to the control and direction of the superior whose act causes the injury, providing they are both co-operating to effect the same common object. It is only when the master or superior places the entire charge of his business, or a distinct branch of it in the hands of an agent or subordinate, exercising no discretion or oversight of his own, that the master is held liable for the negligence of such agent or subordinate.

In the first case on this subject in Pennsylvania, *Ryan v. Cumberland Val. R. R.*,¹ LOWRIE, J., said: "The only way left for defining the supposed duty is to allege that employers are liable when any of those employed by them are injured by the carelessness of their fellow-laborers. Though this proposition has never been decided upon by this court, it has often been considered elsewhere and decided in the negative, and we know but one case that seems to affirm it: 20 Ohio Rep. 415.

"It has been decided in the negative in cases relating to those employed in running railroad cars: 1 McMullan, 385; 3 Cush. 270; 4 Met. 49; 5 Exch. Rep. 343; 6 Barb. R. (Sup. C.) 231; 15 Barb. R. (Sup. C.) 574; in navigating vessels: 2 Richardson, 455; in driving a wagon: 3 Mees. & W. 1; in building: 5 Exch. R. 354; 6 Hill, 592; and in factories: 6 Cush. 75. And such is the rule even where the careless one is the superior of the other, or has a special duty to perform upon which the safety of the others depends. Where we find a road is so well beaten, it is easy to follow it, and its beaten character is an indication that we may follow it with safety. We shall trust to this indication sustained as it is by reasons which have been so fully expressed by others that we can do little else than repeat them.

¹ 23 Pa. 384 (1854).

"The rule announced by these cases is, that where several persons are employed in the same general service, and one is injured from the carelessness of another, the employer is not responsible.

"On what principle can a contrary rule be found? The maxim, *sic utere tuo ut alienum non lædas*, does not apply; for that is the most general of all rules, intended to define the duties of those who have no other relation than contiguity and a common humanity. It is intended as the general rule, defining the general relation of man in society, and not any of the special relations, which must have their own rules, depending upon their special character. Our question is, therefore, reduced to this: What is there in the special relation of master and servant from which a contrary rule can be deduced?

"With us this relation is always instituted by a contract, and to that we must look for the principal terms by which it is defined. The contract defines the duty of each party; and as we do not find that the duty which is now insisted on was made a part of the contract, we infer that it has no existence.

"But it must be conceded that many of the relations of life are instituted in the most general terms, and that the special duties of each party are so well understood in society that they are left entirely undefined in the contract, and each is presumed to have undertaken them without their being formally specified. Certainly no one will pretend that the duty here insisted upon has, in this way, become part of this contract; for no one so understands it, and no one would so contract if requested.

"There is, therefore, no way left but to allege that the law has made it a duty of a master to see that his servants do not injure each other by their carelessness. There is no statute of this purport; and therefore the allegation

must be that it is a part of the common law. But the common law consists of the general custom of the people, and the maxims and principles on which they act; and it is conclusive against the rule contended for that it has never been found among these, and is not deducible from them.

“But the duty insisted upon is substantially one of protection, which cannot exist without implying the correlative one of dependence or subjection. The relations of husband and wife, parent and child, are in law relations of protection and dependence; and there are those which are so in fact, as where a weak-minded person submits himself to the direction of another; and here the law interferes to protect against an undue exercise of influence and power. And there are others, as the Sunday laws and the laws regulating the hours of labor in particular occupations, whereby the law protects men against the danger arising from undue competition; but the strictness used in defining this relation, as belonging to special cases, implies that it has no wider existence.

“There is no relation of protection and dependence between master and servant, or of confidence in the institution of the relation; we speak not of master and apprentice. The servant is no Roman client or feudal vassal, with a lord to protect him. Both are equal before the law, and considered equally competent to take care of themselves, and very often the servant is the more intelligent of the two.

“The argument that the law implies a warranty that one servant shall not be injured by the carelessness of another is only another way of stating the proposition that the law imposes the duty of protection; and it must be set aside by the same answer.

“And what would be the value of such a rule? If it

exists at all it must grow out of the relation and affect all persons standing in it; and this would change all our ideas concerning the relation of master and servant. Every man must have his own business, whether as master or as servant, and there is no business without its risks. Where many servants are employed in the same business, the liability to injury from the carelessness of their fellows is but an ordinary risk, against which the law furnished no protection but by an action against the actual wrong-doer. It would violate a law of nature if it should provide an immunity of any one against the ordinary dangers of his business, and it would be treating him as incapable of taking care of himself.

“If we declare that workmen are warranted against such a carelessness, then the law places all careless men, which means all badly educated or badly trained men, and it places even those who have not acquired a reputation for care, under the ban of at least a partial exclusion from all work. And this is the ordinary result of all unique attempts to protect by law one class of citizens against another. It is done at a practical sacrifice of liberty on the part of those intended to be protected, and to the embarrassment of the common business of life, by imposing upon the people a rule of a new and unusual character which may require half a century to become fitted like a custom, and adapted to the customs already existing which it does not have the effect of annulling.

“If this were the rule, it would embarrass the conduct of all business, where any risk is to be run. How could a sailor be ordered aloft in a storm, without the employers being liable to the charge that the captain had shown want of proper skill and care in giving such an order in the circumstances? How could the wearied laborer be allowed to ride home with the driver, without danger that

the employer should be called to account for an accidental tilting of the cart?

“And such a rule could have very little application to great corporations, for they would immediately act on the maxim, *conventio vincit legem*, and provide against it in their contracts. But it would live to embarrass the more private and customary relations, and be the source of abundant litigation.”

Plaintiff was injured in the shops of the defendant company. These shops were not all under one roof, but the foundry, hammer-shop, and paint-shop were separate from the general machine-shop, which was about seven hundred feet long. Between the foundry and paint-shop and machine-shop a track was laid for the purpose of bringing in materials and supplies to the various shops from the main track and for carrying out the castings, cars, locomotives, and repaired and manufactured articles upon the main track for distribution over the road. All of these works and the men employed therein were under the general charge of one Blackburn, who was known as the master mechanic, and under him was a general foreman. The power of employing and discharging men was with the master mechanic. Each shop had its foreman, and under him were certain gang foremen, who had charge of gangs of men engaged in the performance of particular duties. Vedder was gang foreman of the turning department, and had charge of making rods and links and of gas and steam-pipe fitting. Pope had charge as a boss of a gang of men whose business it was to bring in cars loaded with materials and supplies for the paint shop, foundry, and other shops, and unload them there, and to load any manufactured articles or supplies for the shops into cars for distribution along the road. The plaintiff was employed on a car running into the shop for the

purposes above stated. In the year 1881, Falkenbury, who was foreman of the foundry, obtained permission of the master mechanic to run a gas pipe from the paint-shop to the foundry. This was done by O'Dea, one of the gas-fitters, who carried the pipe across the track at an elevation of sixteen feet three inches above the rail. This occurred on June 29, and the same afternoon the plaintiff was struck by this pipe, when standing on the top of a car in passing under it, but was not injured. The pipe was of such a height as not to hit a man seated on the cars, or when standing up if he stooped a little. Pope, the foreman, was told of it, and said he would see Hawthorne, the general foreman, about it, and the plaintiff says Pope told him it would be taken down. This was not done, and the next day plaintiff was again struck by the same pipe and injured. It was held that plaintiff and the person whose negligence caused the injury were fellow-servants.¹

The deceased, a brakeman, was killed by a collision. It appeared that a telegraphic dispatch was sent by the train-dispatcher to the conductor and engineer of train No. 3, of which deceased was brakeman, requiring them to "wilcat to Newberry Junction ahead of train 39 and report." This order was delivered to conductor of train No. 3 at Jersey Shore before leaving that station. The conductor of train No. 3 testified that it was the usual custom to signal trains approaching from behind at the place where this accident happened, especially on foggy nights, by going back on the track and placing caps on the rails, and that plaintiff's intestate was just about to do this when the collision occurred, but waited a few minutes to fix his fires. In these few minutes the collision took place, which killed the deceased. It was held that

¹ New York, Lake Erie & West. R. R. v. Bell, 112 Pa. 400 (1886).

the accident was caused either by the failure of the brakeman to put caps on the rails behind No. 3, as a signal to No. 39, or by the fellow-servants, the conductor and engineer, either to side-track No. 3 or to give proper signals; and that in either case plaintiff was not entitled to recover.¹

The employees of a railroad company were told by their foreman to go to their working place on a hand-car, and that there was time enough to reach there before a train could overtake them. The foreman's watch was slower than the watch of the conductor of the train, and the hand-car was struck and one of its occupants killed. It was held that the company was not liable for his death.²

In an action for damages for personal injuries brought by an employee against his employer, if the injury is caused by the negligence of another employee of defendant, a general denial of fellow-service is insufficient.³

Who are Fellow-Servants.

398. A laborer on a railroad gravel train is a fellow-servant of a conductor or engineer of the train.⁴

A car-repairer employed in a railroad yard is a fellow-servant of a brakeman.⁵

A track foreman is a fellow-servant of the men under his charge.⁶

A locomotive engineer and a night telegraph operator and station agent are fellow-servants.⁷

¹ *Hoover v. Beech Creek R. R.*, 154 Pa. 362 (1893).

² *Weger v. Pennsylvania R. R.*, 55 Pa. 460 (1867).

³ *Middleton v. Philadelphia Traction Co.*, 21 W. N. C. 528 (1888).

⁴ *Ryan v. Cumberland Valley R. R. Co.*, 23 Pa. 384 (1854).

⁵ *Campbell v. Pennsylvania R. R.*, 2 Atl. Rep. 489 (1886); 17 W. N. C. 73 (1886); *Philadelphia & Reading R. R. v. Hughes*, 119 Pa. 301 (1888); *Donaghy v. Railroad Co.*, 21 W. N. C. 154.

⁶ *Spancake v. Philadelphia & Reading R. R.*, 148 Pa. 184 (1892); *Kinney v. Corbin*, 132 Pa. 341 (1890); *Shea v. Railroad Co.*, 36 P. L. J. 71.

⁷ *Dealey v. Philadelphia & Reading R. R.*, 21 W. N. C. 45 (1886).

A fireman of a locomotive and a station agent who is also telegraph operator are fellow-servants.¹

Two locomotive engineers are fellow-servants.²

Who are not Fellow-Servants.

399. A train dispatcher who has general authority to move trains and make schedules is not a fellow-servant of a train employee. In *Lewis v. Seifert*,³ PAXSON, J., said: "The precise question is, whether Sellers, the train dispatcher, was a fellow-workman with the plaintiff within the meaning of that rule of law which holds that the master is not responsible for an injury received by an employee caused by the negligence of a co-employee or fellow-workman. That rule rests upon the sound principle that each one who enters upon the service of another takes on himself all the ordinary risks of the employment in which he engages, and that the negligent acts of his fellow-workmen in the general course of his employment are within the ordinary risks: *Lehigh Valley Coal Co. v. Jones*, 86 Pa. 432. To constitute fellow-servants the employees need not be at the same time engaged in the same particular work. It is sufficient if they are in the employment of the same master, engaged in the same common work, and performing duties and services for the same general purpose. The rule is the same, although the one injured may be inferior in grade, and is subject to the direction and control of the superior whose act caused the injury, provided they are both co-operating to effect the same common object: *Keystone Bridge Co. v. Newberry*, 96 Pa. 246. Thus we have repeatedly held that a 'mining boss,' under the Act of March 3, 1870, is

¹ *Reiser v. Pennsylvania Co.*, 152 Pa. 38 (1892).

² *Keyes v. Pennsylvania Co.*, 3 Atl. Rep. 15 (1886).

³ 116 Pa. 628 (1887).

a fellow-workman with the miners, and that the mine-owners are not responsible for his negligence: *Delaware & Hudson Canal Co. v. Carroll*, 89 Pa. 374. This, however, is in part owing to the fact that the duty of obtaining a mining boss is imposed upon the mine-owners by the Act of Assembly; hence the responsibility of the latter would seem to cease when they had exercised due care in the selection of that person. Be that as it may, it is well settled that mere difference in rank or grade does not change the rule. But there are some duties which the master owes to the servant and from which he cannot relieve himself except by performance. Thus the master owes to every employee the duty of providing a reasonably safe place in which to work, and reasonably safe instruments, tools, and machinery with which to work. This is a direct, personal, and absolute obligation; and while the master may delegate these duties to an agent, such agent stands in the place of his principal and the latter is responsible for the acts of such agent. And where the master or superior places the entire charge of his business, or a distinct branch of it, in the hands of an agent or subordinate, exercising no discretion or oversight of his own, the master is held liable for the negligence of such agent or subordinate: *Mullan v. The Steamship Company*, 78 Pa. 25; *N. Y., L. E. & W. R. R. Co. v. Bell*, 112 Pa. 400.

“It is very plain that it was the duty of the defendant company, as between said company and its employees, to provide a reasonably good and safe road, and reasonably good and safe cars, locomotive, and machinery for operating its road. It is equally clear that it was its duty to frame and promulgate such rules and schedules for the moving of its trains as would afford reasonable safety to the operatives who were engaged in moving them. This

is a direct, positive duty which the company owed its employees, and for the failure to perform which it would be responsible to any person injured as a consequence thereof, whether such person be a passenger or an employee. It would be a monstrous doctrine to hold that a railroad company could frame such schedules as would inevitably or even probably result in collisions and loss of life. This is a personal, positive duty; and while a corporation is compelled to act through agents, yet the agents in performing duties of this character stand in the place of and represent the principal. In other words, they are vice-principals.

"If it be the duty to provide schedules for the moving of its trains which shall be reasonably safe, it follows logically that when the schedules are departed from, when trains are sent out without a schedule, such orders should be issued by the company as will afford reasonable protection to the employees engaged in the running of such trains. I am not speaking now of collisions caused by a disobedience of orders on the part of conductors and engineers, but of collisions or other accidents the result of obeying such orders.

"At the time of the collision referred to, Wellington Bertollette was the general dispatcher of the defendant company, and from his office in Philadelphia had the general power and authority of moving the trains. In this he was not interfered with by the company or any one else. For the purpose of sending out the trains he wielded all the power of the company. He could send a train out on schedule time or he could hold it back. He could change the schedule time or make new schedules as the exigency of the case required. He could send a train out without schedule, and direct its movements from his office in Philadelphia. When he issued an order the train was bound to move as he directed. The engineer

and conductor had but one duty and that was obedience. In *Slater v. Jewett*, 85 N. Y. 61, the late Chief Justice FOLGER thus clearly stated the duties of railways in this particular: 'It is urged and with reason, that clearly arranging and promulgating the general time-table of a great railway is the duty and the act of the master of it; and that when there is a variation from the general time-table for a special occasion and purpose, it is as much the duty and act of the master, and he is as much required to perform it; that it is the duty and act of the master to see and know that his general time-table is brought to the knowledge of his servants who are to square their actions to it; that the same is his duty and act as to a variation from it, which is but a special time-table; and, therefore, whoever he uses to bring those time-tables to the notice of his servants, he puts that person to do an act in his stead, inasmuch as the responsibility is upon him to see and know that it is done, and done effectually, and that if, instead of doing it in person, he chooses to do it through an agent, that agent *pro hac vice*, is the master, and he, the master, is responsible for a negligent act therein of that agent, whereby a fellow-servant of his is harmed. This rule has been laid down in repeated cases in this court.'

"It is true the order in this case was sent by John J. Sellers who was the assistant of Bertolette, and in his absence was clothed with all his powers. For the purpose of this case Sellers was Bertolette and Bertolette was the company.

"The distinction between a general dispatcher—one who has the absolute control of all trains upon the road—and the conductor or engineer of a train is manifest. The latter have the duty of obedience. Their business is to run their trains under orders from the dispatcher,

and if an employee is injured as the result of their negligence, the company is not liable. They are in the same common employment, and are laboring together to the same end, under orders from superior authority. The argument for the plaintiff in error, if carried to its logical conclusion, would wholly obliterate all distinction between railroad employees from the president down, as they may all be said to be in one sense in the same common employment and paid by the same corporation.

"While the cases are not uniform upon this subject the weight of authority is with the foregoing views. In addition to the authorities cited, we may refer to *Flike v. R. R.*, 53 N. Y. 549; *Pittsburgh, Cin. & St. L. R. R. Co. v. Henderson*, 5 Amer. & Eng. R. R. C. 529; *McKinne v. C. S. R. R. Co.*, 21 Ib. 539; *Phillips v. Chicago, Milwaukee & St. Paul R. R. Co.*, 23 Ib. 453; *Phillips v. R. R.*, 64 Wis. 475; *Washburn v. R. R.*, 3 Head. (Tenn.) 38. Against these authorities we have only *Robertson v. T. H. & I. R. R. Co.*, 8 Amer. & Eng. R. R. C. 175, and *Blessing v. St. Louis, Kansas City & Northern R. R. Co.*, 77 Mo. 410, and 15 Amer. & Eng. R. R. C. 298. These cases, however, do not sustain the broad principle contended for here, and if they did, we would not be disposed to adopt them in the face of so much respectable authority the other way. Aside from authority, I am of opinion that the doctrine we have announced is founded upon the better reason, and is a rule both valuable and necessary for the preservation of the lives, not only of railway employees, but of the traveling public as well."

A person engaged by a railroad company as superintendent of work at a tunnel acting in the place of the company's master of road, is not a fellow-servant of a flagman on a gravel train.¹

¹ *Tissue v. Baltimore & Ohio R. R.*, 112 Pa. 91 (1866).

The employees of a railroad company who negligently repaired the boiler of a locomotive in the repair shop are not the fellow-servants of the engineer and fireman subsequently killed by the explosion of the locomotive.¹

A carpenter working on a railroad bridge, and receiving free transportation to and from his work as part of his compensation is in the position of a passenger, and not of a fellow-servant of a train hand.²

An owner of a freight car who accompanied his car agreed to attend the brake. Such an agreement did not constitute him a person in the employment of the company, so as to prevent him from bringing an action against the company for injuries caused by the negligence of one of the company's employees.³

Fellow-Servants Under Act of April 4, 1868.

400. The Act of April 4, 1868, P. L. 714, provides: "That when any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the roads, works, depots, and premises of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employee, the right of action and recovery in all such cases against the company shall be such as only would exist if such person were an employee: *Provided*, that this section shall not apply to passengers."

Constitutionality of the Act.

401. The act is constitutional. "It may be conceded that the natural rights of men, among them that of personal security, are guarded by the Bill of Rights, and 'that all courts shall be open, and every man for an in-

¹ *Pennsylvania & N. Y. Canal R. R. Co. v. Mason*, 109 Pa. 296 (1885).

² *O'Donnell v. Allegheny Valley R. R.*, 59 Pa. 239 (1868).

³ *Lackawanna & Bloomsburg R. R. Co. v. Chenewith*, 52 Pa. 382 (1866).

jury done him, in his lands, goods, person, and reputation, shall have remedy by due course of law and right and justice, administered without sale, denial, or delay.' But in what respect does this law trench upon this guaranty, or, indeed, on any other in the Constitution? The person to be affected by it must be one lawfully engaged or employed on or about the road, etc. To be thus engaged he must be there by his own consent. He is, therefore, voluntarily there to perform some act or business connected with the road or its works. He knowingly assumes a relation regulated by the law, and thus places himself under the operation of the law which governs the relation. He is not bound to assume the relation, and when he does he acts with his eyes open. The law is not retrospective, and takes from him no remedy for an injury already sustained. The relation he assumes is one of danger, and the fact of danger authorizes the regulation by the State as the conservator of the lives, security, and property of her citizens. It is a police regulation which, having respect to the general good, forbids individuals from undertaking a dangerous employment, except at their own risk, to the same extent as if they were in the immediate employment of the railroad company. Leaving each one to assert his proper remedy against the person whose act or negligence does him the injury, the law says to him that the legal principle of *respondeat superior* shall have no place in this particular relation; that, as a matter of proper policy for the good of all, those who voluntarily venture into employment alongside of the servants of a railroad company shall have just the same remedies for injuries happening in the employment that these have, and none other. In doing this no fundamental right of the person thus voluntarily venturing is cut off or struck down. The liability of the company for the

acts or omissions of others, though they be servants, is only an offspring of law. The negligence which injures is not theirs in fact, but is so only by imputation of law. The law which thus imputes it to the company, for reasons of policy, can remove the imputation from the master and let it remain with the servant whose negligence causes the injury."¹

Classification of Cases Under the Act.

402. The cases under the Act of 1868 divide themselves into two classes. In the first the place of the accident is clearly and for general purposes the "roads, works, depots, or premises" of the railroad company. In such cases it is sufficient if the person injured is lawfully "engaged or employed on or about" them, and is not a passenger. The second class is where the accident occurs in a place which is not exclusively and for general purposes, but only, within a limited and statutory sense, the premises of the railroad company. In this class the nature of the employment at which the party injured was engaged at the time becomes material. If it is business connected with the railroad in the sense that it is ordinarily the duty of railroad employees, then while the party is engaged at it the statute treats him as a *quasi* employee, and puts his rights upon the same basis. If, however, the work has no relation to railroad work as such, and is connected with the railroad only by irrelevant and immaterial circumstances of locality, the case is not within the statute at all.²

Cases Under the First Class.

403. The plaintiff, a consignee of goods, called for the goods before they had been unloaded, and the agent of

¹ Per AGNEW, C. J., in *Kirby v. Pennsylvania R. R.*, 76 Pa. 506 (1874).

² *Spisak v. Baltimore & Ohio R. R.*, 152 Pa. 281 (1893). Per MITCHELL, J.

the company pointed out to him the car containing them, which stood upon a siding, unlocked. He entered the car and commenced handing them out to a companion. While he was thus occupied a number of coal cars were shunted off upon the siding, striking the car in which he was, knocking him over and injuring his thumb. It was held that plaintiff was not entitled to recover.¹

Deceased, while helping to unload a car in a depot of the defendant, was killed by the negligence of the company's employees. It was held that he was within the terms of the act.²

A teamster employed by a shipper of freight for the purpose of delivering his employer's goods at the car into which they are to be loaded for transportation, is while driving his wagon at a point on a public street practically within the company's yard, a fellow-servant of the company's employees.³

A laborer employed by a contractor in widening the road-bed of a railroad is a fellow-servant of the company's employees operating a train, within the meaning of the act.⁴

A mail agent in the employ of the United States Post Office Department, while traveling on a railroad in the performance of his duties, is not a passenger, but is in the position of an employee, and within the meaning of the act.⁵

But a newsboy permitted to sell papers on a street car is not a fellow-servant of the conductor within the mean-

¹ Ricard v. North Pennsylvania R. R., 89 Pa. 193 (1879). See, also, Kirby v. Pennsylvania R. R., 76 Pa. 506 (1874).

² Gerard v. Pennsylvania R. R., 12 Phila. 394 (1878).

³ Baltimore & Ohio R. R. v. Colvin, 118 Pa. 230 (1883).

⁴ Fleming v. Pennsylvania R. R., 134 Pa. 477 (1890). See s. c., 2 Mona. 743 (1888). See Catawissa R. R. v. Armstrong, 49 Pa. 186 (1865).

⁵ Pennsylvania R. R. v. Price, 96 Pa. 256 (1881).

ing of the Act of 1868. In a case where a newsboy was injured by the negligent act of the conductor in pushing him from the car, the court said: "Plaintiff was a newsboy, engaged in selling papers; his employment was not on the car, he was only casually there, he sold to all, whether in or out of the car, and was suffered to pass in and out for this purpose at his pleasure. He was not a trespasser, however, the usage of the company at that time was to permit newsboys upon their cars, without objection; but, whilst he was on the car, he was neither engaged nor employed in the performance of any act or business connected with the road or its works. As well might we say that those who in the regular course of business pass with wagons, etc., up and down the company's tracks, in case of injury from the company's negligence, would be regarded as employees, because they were at the time engaged or employed on or about the company's road. It is certainly absurd to suppose that the Act of 1868 was intended to have any such application. The persons who were in contemplation of the legislature in the Act of 1868, are those who, although not employees of the company, are nevertheless engaged or employed on or about the company's road or works in the performance of some act or business connected therewith."¹

A drover who accompanies a car of cattle and travels on a pass issued to him by the railroad company is a passenger, and is not within the meaning of the act.²

Cases Under the Second Class.

404. A brakeman employed by the Lackawanna & Bloomsburg Railroad Company was injured by a train

¹ Philadelphia Traction Co. v. Orbann, 119 Pa. 37 (1888).

² Hanover Junction, etc., R. R. v. Anthony, 3 Walker, 210 (1883).

of the Delaware, Lackawanna & Western Railroad Company. The track was owned by the Lackawanna & Bloomsburg Railroad Company. The former company had the right of trackage over the road by virtue of an agreement between the two companies, and the train of the Delaware, Lackawanna & Western Railroad Company was lawfully upon the track. There were two tracks at the point where the injury occurred. Between the inside rails of said tracks there was a space of seven feet in width, leaving a clear space between passing trains of about three and one-half feet in width, while outside of the southern track there was room to walk without danger. On the morning of June 29, 1871, the plaintiff was on his way approaching Scranton from a northerly direction; when near Jackson Street he got off from his train to turn the switch, and, having performed this duty, he went to the watchman's house near the switch, where he remained some time in conversation with the watchman, then lighted his pipe and started toward Scranton to join his train, walking on the northern track. When he stepped on said track a train was passing him on the southern track. Instead of waiting until the train had passed, and then crossing over both tracks to the outside of the southern track, where there was clear space to walk with safety, he continued walking on the northern track until he was overtaken by defendant's train, moving in the same direction, which struck and badly injured him. It was held that plaintiff was within the meaning of the Act of April 4, 1868, an employee lawfully engaged about the road of the Delaware, Lackawanna & Western Railroad Company, and therefore entitled only to such right of action as if he had been an employee of that company.¹

¹ *Mulherrin v. Del., L. & W. R. R. Co.*, 31 Pa. 366 (1876).

If a siding is on private property, but the railroad company is licensed to use it, an employee of the owner of the siding who is employed in unloading cars is within the terms of the act, and cannot recover from the railroad company for an injury caused by the company's employees.¹

The yard foreman of a refining company who was injured through the negligence of a railroad company's employees, while in the discharge of his duty of separating a train of cars upon a siding in the refining company's yard, is within the provisions of the act.²

Plaintiff's intestate was employed in an iron mill to haul ashes from the mill to a cinder pile across a railroad switch within the mill yard. While moving some empty cars which blocked his way across the switch, an engine moved on to the switch, and without warning pushed the cars together, and killed the workman. It was held that the deceased was not an employee within the meaning of the act.³

Plaintiff, an employee of an iron company, was injured while engaged in carrying to the mill of the company some bar iron which had been unloaded the day before from a railroad car, and piled up between the two tracks of a private siding, and on the iron company's ground. The siding was connected with two railroads, by each of which freight was shipped to and from the iron mill. Plaintiff was struck by one of the shifting engines of the defendant company. It was held that he was not an employee of the railroad company within the meaning of the Act of 1868. The court said: "The plaintiff was not employed or engaged in any business connected with the

¹ *Cummings v. Pittsburgh, Cincinnati & St. Louis Ry.*, 92 Pa. 82 (1879).

² *Stone v. Pennsylvania R. R.*, 132 Pa. 206 (1890).

³ *Richter v. Pennsylvania Company*, 104 Pa. 511 (1883).

railroad. There was a pile of iron on the ground of the rolling-mill, and plaintiff was engaged in carrying it into the mill. The iron had in fact been unloaded from the cars the day before, but the act of unloading had been fully completed, and had no connection with plaintiff's work. So far as that was concerned, there was no difference whether the unloading was the day before or the year before. So, also, the fact that when unloaded it had been piled up between the two tracks had nothing to do with plaintiff's work, except that it involved the incident, immaterial so far as the nature of his work was concerned, that he had to cross one of the tracks in going to and fro between the pile and the mill. If the iron had been piled between the track and the mill, his employment would have been exactly the same, and yet he would not have had anything to do with the track. As said in *Richter v. Pennsylvania Co.*, 104 Pa. 511, plaintiff's 'business was not with or about the railroad, or its cars, but about the iron works, and he became neither an employee nor *quasi* employee of the defendant, simply because he attempted to remove one of its cars from his path.' That case, in fact, is so closely on all fours with the present that it is unnecessary to do more than refer to it generally for the principles by which this is to be ruled."¹

Plaintiff was the brakeman of a locomotive belonging to a steel company which owned two spur tracks connecting its works with the defendant's lines. After the railroad company had delivered a car and after the car had been unloaded, plaintiff, at the direction of the yard boss of the steel company, removed the car from the receiving track to the scales, to take its light weight. While doing so he was injured through the negligence of one of defendant's employees. It was held that the intermediate un-

¹ *Christman v. Philadelphia & Reading R. R.*, 141 Pa. 604 (1891).

loading, shifting, and weighing of the car was the work of the steel company on its own land, that the connection of the railroad company with the place of the accident by reason of its joint use of the tracks for other purposes was immaterial, and that plaintiff was neither an employee in fact, nor doing work which made him a *quasi* employee under the statute.¹

If no delivery of goods is intended at the point where two railroads connect with each other, but the delivery takes place in the yards of one of the companies beyond the point where the roads actually met, the operation of trains by the first company in the yards of the second company is not in performance of a duty which the second company is required to do, and employees of the two companies are not fellow-servants within the meaning of the act.²

Wanton Act of Fellow-Servant.

405. If a conductor maliciously and wantonly ejects an employee riding without right on a car, the railroad company is not liable. In a case originating in Pittsburgh it appeared that a train of empty passenger cars was being moved from Manchester to the Union Depot, a distance of about two miles. It was before daylight in the morning. The cars were locked. Plaintiff was in the employ of the company as a laborer. He got on the front car, without the knowledge of the conductor, and sat down on the platform. He testified that the conductor came out of the car and said to him, "You get off of here; what took you on this train?" Plaintiff answered that he was going up to the Union Depot to work on the track. The conductor replied, "I don't care, you

¹ *Spisak v. Baltimore & Ohio R. R.*, 152 Pa. 281 (1893).

² *Vannatta v. Central R. R. of New Jersey*, 154 Pa. 262 (1893).

will have to get off the train." Plaintiff said to him the train was going too fast to get off. The conductor answered, "Well, you get off," following it by an oath and the peremptory order, "get off." Plaintiff again said that he could not, as it was going too fast. The conductor repeated his profane language, and that he "had got to get off," and then "he just took hold hold of me by this arm, and lifted me off my feet, and pushed me right off." Each morning a train of cars was passed from its place of storage to the Union Depot. There it would take its departure as a train for the carrying of passengers. Plaintiff testified that although while thus moving toward the Union Depot, it was an empty train on which no fare was collected, yet "every morning it would be full of men who jumped on the cars." He further testified that when he was pushed off, the train was running at about eight miles an hour; that it was so dark that he could not see where he was going, and that he fell on a pile of cinders, sustaining grievous injury. It was held that if the conduct of the conductor was wanton, plaintiff could not recover.¹

¹ *Pennsylvania Company v. Toomey*, 91 Pa. 256 (1879).

CHAPTER XXXII.

NEGLIGENCE—INJURIES TO PASSENGERS.

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| 406. Duty of Carrier. | 419. Alighting on Wrong Side of Train. |
| 407. Duty to Provide Proper Road-Bed. | 420. Alighting at Dangerous and Unusual Place. |
| 408. Duty to Keep Cattle from Track. | 421. Announcement of Station. |
| 409. Presumption of Negligence. | 422. Riding on Platform. |
| 410. Rebuttal of Presumption of Negligence | 423. Riding in Baggage-Car. |
| 411. No Presumption of Negligence if the Accident is Unconnected with the Means of Transportation. | 424. Riding in Caboose. |
| 412. Accidents at Stations—Standing on Edge of Platform. | 425. Riding in Mail Car. |
| 413. Falling Over Unprotected End of Platform. | 426. Riding on Locomotive. |
| 414. Falling from Unprotected Opening in Overhead Bridge. | 427. Riding in Different Car from where Contract Provided. |
| 415. Crossing Tracks at Station. | 428. Sitting with Arm out of Window. |
| 416. Getting on Train. | 429. Acts of Other Passengers. |
| 417. Alighting from Train — Trains must be stopped a Sufficient Time. | 430. Ejection of Passenger at Improper Place. |
| 418. Passenger Must Not Jump from Moving Train. | 431. When Passenger is Carried Beyond Station. |
| | 432. Where Passenger Obeys Instruction of Conductor. |
| | 433. Concurrent Negligence. |

Duty of Carrier.

406. A carrier of passengers is bound to omit no precaution that may conduce to their safety, and he must guard, beforehand, against every apparent danger that may beset them.¹

Where a railroad company undertakes the transportation of a passenger for an agreed price, the contract im-

¹ *New Jersey R. R. Co. v. Kennard*, 21 Pa. 203 (1853).

plies that the company is provided with a safe and sufficient railroad to the point indicated; that its cars are staunch and road-worthy; that means have been taken beforehand to guard against every apparent danger that may beset the passenger, and that the servants of the company are tried, sober, and competent men.¹

Carriers of passengers are not insurers of the safety of passengers as they are of the safety of goods and baggage, but they are bound to guard a passenger from every danger which extreme vigilance can prevent. "The utmost which human knowledge, human skill, and human foresight and care can provide is all that in reason can be required. To ask more is to prohibit the running of railways, unless they possess a capital and surplus which will enable them to add a new element to their business—that of insurance. Nor can we carry the requirement beyond the use of known machinery and modes of using it. Railroads must keep pace with science and art and modern improvement in their application to the carriage of passengers, but are not responsible for the unknown as well as the new."²

Duty to Provide Proper Road-Bed.

407. If a passenger is injured by an accident which occurs by the washing away of an embankment because of insufficient drainage the company will not be relieved from liability by the fact that the embankment was constructed under the supervision of a competent civil engineer, and that the drainage was provided for in a manner directed and approved by him.³

A passenger train became derailed by reason of the de-

¹ *Sullivan v. Phila. & Read R. R. Co.* 30 Pa. 234 (1858).

² *Meier v. Pennsylvania R. R.*, 64 Pa. 225 (1870). Per AGNEW, J.

³ *Philadelphia & Reading R. R. v. Anderson*, 94 Pa. 351 (1880).

cayed condition of the ties. Plaintiff, perceiving that the car in which he was riding was being dragged over the sleepers, left his seat, and, following an employee of the company, jumped from the platform and was injured. The car was dragged but a short distance, and no other passengers were injured. It was held that the case was for the jury. The court said: "It was the duty of the defendant in error to make all reasonable efforts to protect himself against impending danger. The ties appear to have been decayed; the track was dangerous; the jury have found the defendant in error did not jump from apprehension of danger which did not exist, but under circumstances making it a reasonable act of prudence on his part."¹

Duty to Keep Cattle from Track.

408. A railroad company carrying passengers is bound to use the highest degree of care and vigilance to keep cattle off the track of their road. If the railroad company fails to erect cattle-guards, or put up fences at points where cattle are in the habit of straying, it is guilty of negligence.²

Presumption of Negligence.

409. *Prima facie*, where a passenger, being carried on a train, is injured, without fault of his own, through an accident to the means of transportation, there is a legal presumption of negligence, casting upon the carrier the onus of disproving it. This is the rule when the injury is caused by a defect in the road, cars, or machinery, or by a want of diligence or care in those employed, or by

¹ Pittsburgh, Buffalo & Western R. R. Co. v. Rohrman, 13 W. N. C. 258 (1883).

² Wright v. Pennsylvania R. R., 3 Pittsburgh Rep. 116 (1869); Lackawanna & Bloomsburg R. R. v. Chenewith, 52 Pa. 382 (1866); Sullivan v. Philadelphia & Reading R. R., 30 Pa. 234 (1858).

any other thing which the company can and ought to control as a part of its duty to carry the passengers safely; but this rule of evidence is not conclusive. The carrier may rebut the presumption, and relieve himself from responsibility by showing that the injury arose from an accident which the utmost skill, foresight, and diligence could not prevent.¹

Plaintiff's intestate purchased a ticket and went upon a steamboat belonging to a railroad company. Within a very short time, and just as the boat was fairly clear of the wharf, a violent explosion occurred, resulting in the death of plaintiff's intestate. It appeared conclusively from the evidence that the explosion was not of the boiler or machinery of the boat, nor was it due to gunpowder or petroleum. There was some evidence that dynamite had been taken upon the boat by some unknown person

¹ *Meier v. Pennsylvania R. R.*, 64 Pa. 225 (1870); *Delaware, Lackawanna & Western R. R. v. Napheys* 90 Pa. 135 (1879); *Dayton v. New York Canal & Railroad Co.*, 1 C. P. Rep. 9 (1879); *Philadelphia & Reading R. R. v. Anderson*, 94 Pa. 351 (1880).

In *Laing v. Colder*, 8 Pa. 479 (1848), BELL, J., said: "It is long since settled that the common-law responsibilities that attach to carriers of goods for hire do not, as a whole, extend to passenger carriers. Like the former, the latter are not insurers against all such accidents and injuries as are not occasioned by the act of God or the public enemy; but, though in legal contemplation they do not warrant the absolute safety of their passengers, they are yet bound to the exercise of the utmost degree of diligence and care. The slightest neglect against which human prudence and foresight may guard, and by which hurt or loss is occasioned, will render them liable to answer in damages. Nay, the mere happening of an injurious accident raises, *prima facie*, a presumption of neglect and throws upon the carrier the onus of showing it did not exist. This punctilious attention to the safety of the passenger embraces the duty of providing sufficient carriages or other conveyances for the journey, in every respect sea and river-worthy; safe and steady horses or other means of progression; and skillful drivers, conductors, and other agents, whose duty it is to use every precaution against danger. Should there be the least failure in any of these things, the proprietors have failed of the discharge of their legal obligations. Above all, if there be in any part of the road a particular passage more than ordinarily dangerous, or requiring superior circumspection on the part of the passenger, the conductor of the vehicle is bound to give due notice of it, and a failure to do so will make his principal responsible."

just before it left the wharf. It was held that there was a presumption of negligence on the part of the railroad company, as the accident had occurred to the vehicle or instrument of carriage.¹

Where a passenger is injured in an accident caused by a misplaced switch, the burden of proof is on the company to show that by no human skill or forethought could the accident have been prevented, and the jury cannot find that the switch was misplaced by a stranger, where there is no evidence whatever to that effect.²

Rebuttal of Presumption of Negligence.

410. Where an accident occurs to the means or instrument of transportation, and evidence is introduced by the defendant tending to rebut the presumption of negligence, the case is for the jury. "The presumption of a fact in law which carries a case to the jury necessarily leaves them in possession of the case. True, the evidence to rebut the presumption may be very strong, yet it is a matter for the jury and not for the court."³

The presumption of negligence is not repelled by the fact that the passenger was injured by reason of the car being thrown from the track through a collision with a cow which was unlawfully on the road. In *Sullivan v. Phila. & Read. R. R. Co.*,⁴ WOODWARD, J., said: "We do not wish to be understood as laying down a general rule that all railroad companies are bound, independently of legislative enactment, to fence their roads from end to

¹ *Spear v. Philadelphia, Wilmington & Baltimore R. R.*, 119 Pa. 61 (1888).

² *New York, Lake Erie & Western R. R. v. Daugherty*, 11 W. N. C. 437 (1882).

³ *Spear v. Philadelphia, Wilmington & Baltimore R. R.*, 119 Pa. 61 (1888); *Sullivan v. Philadelphia & Reading R. R.*, 30 Pa. 234 (1858).

⁴ 30 Pa. 234 (1858). See, also, *Lackawanna & Bloomsburg R. R. v. Chenevith*, 52 Pa. 332 (1866).

end, but we do insist that they are bound to carry passengers safely, or to compensate them in damages. If a road runs through a farmer's pasture grounds, where his cattle are wont to be, possibly, as between the company and the farmer, the latter may be bound to fence; but, as between the company and the passenger, the company are bound to see that the cattle are fenced out. If cattle are allowed to wander on uninclosed grounds, through which the road runs, the company are bound to take notice of this fact; and, either by fencing in their track, or by enforcing the owner's obligation to keep his cattle at home, or by moderating the speed of the train, or in some other manner, to secure the safety of the passengers. This is their paramount duty. To enable them to perform it, the law entitles them to a clear track: 7 Harris, 298; 12 Harris, 469. Neither cows nor men, not even the servants of the company engaged in the company's work, are permitted to obstruct it. And because their right to a clear track is absolute, their duty to carry safely is imperative. If they tolerate obstructions, they must avoid the danger by reduced speed and increased vigilance, or answer for the consequences."

No Presumption of Negligence if the Accident is Unconnected with the Means of Transportation.

411. If the accident is not connected with the means of transportation and there is no evidence of the company's negligence the case should be withdrawn from the jury.

A passenger while seated at the open window of a car was struck in the arm by a missile with sufficient force to cause a fracture thereof. It was not shown what caused the injury; the appellant did not see the missile, nor was it found in the car. There was no evidence that any one

was near the train on the outside who could have inflicted the injury. Suit was brought to recover damages for the injury referred to. The theory of the appellant was that it was caused by a loose nut thrown from one of the switches of the defendant's road-bed, over which the train was passing at the time. This was a mere theory, however, without any evidence to sustain it. The appellant contended that, under such circumstances, the question of the defendant's negligence should have been submitted to the jury. The court took a contrary view of the case, and directed a verdict for the defendant, and judgment upon the verdict was sustained upon an appeal.¹

Plaintiff, a passenger, was sitting in a car at an open window. He was struck in the eye by something like a piece of coal. At the time that he was struck he observed another engine and train of the defendant company rapidly passing the window in the opposite direction on an adjacent track. The company's employees in charge of the train on which plaintiff was, testified that they knew nothing of the occurrence, and had done nothing to bring it about. Other employees in charge of passing trains testified that they had not drawn or worked at their fires, or thrown off any slate, coal, or any other substance from their engines or tenders, and that none had fallen therefrom. Evidence was also introduced to prove that all the appliances, machinery, etc., of the road, including the engines, were in good order, and that the latter were properly provided with approved spark-arresters, etc. There was no derailment of the train, no collision with any train or other object on the road, no breaking of any machinery connected with the passing train, nor any evidence of anything wrong with the passing trains or cars. It was held that the mere fact of the accident, unconnected as it

¹Thomas v. Philadelphia & Reading R. R., 143 Pa. 180 (1892).

was, with any of the appliances of transportation, raised no presumption of negligence on the part of the company.¹

Plaintiff purchased a ticket from the defendant company entitling him to carriage from Philadelphia to Burlington, N. J., and was proceeding from the ticket office to the boat, on which part of the journey was to be made. His route was through a long, narrow passage intended to accommodate persons passing in single file. At the end near the landing was a door, the upper half of which was provided with glass, and which swung either way to permit the passage of persons to and from the boat. The person in front of plaintiff passed out at the door, leaving it to swing back behind him. The plaintiff put out his hand to arrest its motion and push it open again, and instead of directing his hand toward the frame or wooden portions of the door, pushed it against the glass, which broke under the force of the impact and let his hand through, cutting it and inflicting the injury sued for. It was held that, under the circumstances, the mere fact of injury raised no presumption of negligence on the railroad company. WILLIAMS, J., said: "The plaintiff was injured in the waiting-room or passageway leading to the wharf by putting his hand through the glass in the swinging door. The door was no part of the machinery employed for the carriage of passengers. It was not built upon a pattern peculiar to the defendant company. So far as the pleadings or the plaintiff's evidence enable us to judge, it was constructed like the swinging doors to be met with in places of business in every part of the country. It was certainly visible to all comers and goers passing between the waiting-room and the boat, for it was so located that all passengers were obliged to push it open in passing to or from the landing. If there was

¹ Penn-ylvania R. R. v. MacKinney, 124 Pa. 462 (1889).

anything in the construction of the door that made it unfit for the purpose for which it was used, or the place at which it was located. It was easy for the plaintiff to show it by a multitude of witnesses. There was no reason, therefore, for resorting to the legal presumption of negligence in his case. The cause of the accident and the location and construction of the door were so clearly known to the plaintiff as to the defendant and its employees, and it was the duty of the plaintiff to make out his case if action in this case as he would be bound to do if the swinging door had been in a hotel or store. Not having done this, the court was clearly right in entering the verdict.

Plaintiff, a passenger, was injured by the breaking of the axle of the truck of the car in which he was riding. Defendants proved that new wheels and new axles of good quality had been put under the car four months before the accident; that the train had been inspected seventy miles east of the accident, and again twenty-two miles east of it; that the track and the road were in good order, and that the train was running at a proper speed. They also proved that they employed such appliances as were approved by the most experienced operators and mechanics; and gave evidence generally for the purpose of showing that they used the utmost care that human knowledge, skill, and foresight could provide, and that the accident was due to some circumstance against which these could not guard. A verdict and judgment for defendant was sustained on a writ of error.¹

A passenger alleged that he was injured by a severe shock caused by defendant's employees permitting a car which they were coupling, to strike the train in which he

¹ Hayman v. Penn. R. R. 118 Pa. 508 (1888).

² Meler v. Pennsylvania R. R., 64 Pa. 225 (1870).

was seated, with more violence than was necessary to move the springs and effect the coupling. No injury was done to the car or to the means of transportation. The defendant introduced evidence tending to show that the coupling was made in a proper manner. It was held that the burden of establishing the negligence of the railroad company was on the plaintiff.¹

After a train has come to a full stop at its terminal station, and a passenger in stepping from the lowest step of a car to the ground, fractures her knee-cap without any apparent cause, no presumption of negligence is raised against the railroad company. The court said: "The general rule is that a party who alleges negligence as the basis of a claim for damages is bound to prove the fact alleged, and the extent of the injury, if more than nominal damages are claimed; but in some cases slight proof only is required to justify a presumption of negligence. The mere circumstances attending the injury when put in proof may be enough to cast the burthen of exculpation on the defendant. If a passenger seated in a railroad car is injured in a collision, or by the overthrow of the car, the breaking of a wheel, axle, or other part of the machinery, he is not required to do more in the first instance than to prove the fact and show the nature and extent of his injury. A *prima facie* case of negligence is thus made out, and the onus is cast upon the carrier to disprove negligence. It was accordingly said in *Sullivan v. The Philadelphia & Reading R. R.*, 6 Casey, 234, when a railroad company undertakes the transportation of a passenger for an agreed price, 'the contract implies that they are provided with a safe and sufficient railroad to the point indicated; that their cars are staunch and road-worthy; that means have been

¹ *Herstine v. Lehigh Valley R. R.*, 151 Pa. 244 (1892).

taken beforehand to guard against every apparent danger that may beset the passenger, and that the servants in charge are tried, sober, and competent men. When in the performance of this contract a passenger is injured without fault on his part, the law raises *prima facie* a presumption of negligence, and throws on the company the onus of showing that it did not exist.' It is reasonable that it should be so, because the company has in its possession and under its control, almost exclusively, the means of knowing what occasioned the injury and of explaining how it occurred, while as a general rule, the passenger is destitute of all knowledge that would enable him to present the facts, and fasten negligence on the company, in case it really existed. The facts of the present case are very different. The cars were at rest on the track; there was no jar or breaking of machinery; Mrs. Napheys, with the assistance of her husband, was descending the steps from the platform of the car. They had every opportunity of seeing and knowing where she was going, and controlling her movements. If the lower step was inconveniently or dangerously high for her in the condition she was, she and her husband had as good an opportunity as any one else of knowing the fact. If they had even a suspicion that it was in the least degree unsafe for her to take the last step, there was no urgent necessity for her to do so. The train had reached its destination and there was no occasion for haste in leaving the car. If they had an apprehension of danger, or even inconvenience in descending from the lower step, there was nothing to prompt them to incur the risk. They might have called on those in charge of the train to provide a better and more convenient means of egress, if they deemed it necessary. Taking the uncontradicted facts of the case as they were presented, there existed no

reason for relaxing the general rule that he who alleges negligence as the basis of a claim for damages is bound to prove it affirmatively.”¹

Accidents at Stations—Standing on Edge of Platform.

412. A passenger who had been drinking stood upon the edge of the platform of the station so close to the track that he was struck by a passing train. It appeared that the whistle and bell of the train were sounded, and it was uncontradicted that the track at and near the station was on a straight line, and that a man standing six or seven feet from the track could have seen an approaching train for half a mile and in ample time to avoid danger. It was held that the plaintiff was guilty of contributory negligence and could not recover from the railroad company.²

Where a person was killed by a passing train while standing on a platform, the court charged that the “jury ought to be satisfied that deceased knew what the whistle meant. If he knew it was the approach of the fast line, and knew that his position where he stood was dangerous, then it would be careless in him not to seek safety, and if so, and he rashly exposed himself to danger, plaintiff cannot recover.” On appeal by the railroad company the judgment against the company was reversed, the court holding that the charge was erroneous. The instruction should have been that the decedent was charged with knowledge or regarded as knowing if he had such warnings as would with ordinary caution in those circumstances have saved him from danger.³

¹ Delaware, Lackawanna, etc., R. R. v. Napheys, 90 Pa. 135 (1879).

² Pennsylvania R. R. v. Bell, 122 Pa. 58 (1888); Carroll v. Pennsylvania R. R., 12 W. N. C. 348.

³ Penna. R. R. Co. v. Henderson, 43 Pa. 449 (1863).

At a station on defendant's railroad there was a passenger platform flush with the tracks of the railroad, and about one hundred and thirty feet in length and from eight to ten feet in width. At each end of the passenger platform was a raised platform used for shipping baggage and freight. The elevated platform stood four feet out or away from the outer rail of the tracks. The passenger platform extended and was continued into this space of a width of four feet between the raised platform and the rail and along the full length of the raised platform. There was no warning board or notice, nor was there any gate, bar, or rail at this contracted portion of the platform to forbid passengers from going thereon. It was testified that the bumper or deadwood of the engine extending laterally out from or beyond the edge of the rail about twenty inches, so that the entire passenger platform was swept or overlapped by the bumper of the engine to a distance of twenty inches from the outer edge of the platform. The deceased went to the station for the purpose of taking a train, and was standing with a companion in the narrow space at the end of the platform. Both plaintiff and his companion had their backs turned toward the train and were leaning on the raised platform. The deceased, having been notified that the train was coming, stepped around his companion, and while in the act of doing so was struck by the approaching train, receiving injuries from which he died. It was held that plaintiff could not recover.¹

Falling Over Unprotected End of Platform.

413. Plaintiff, a passenger, was injured by falling over the unprotected end of a station platform. The platform

¹ *Matthews v. Pennsylvania R. R.*, 148 Pa. 491 (1892).

was elevated about three and one-half feet above the level of the track. At the east end there was a flight of steps which only extended about half-way across the platform, leaving three or four feet of the end without steps. There was no fence or guard upon the portion of the end not occupied by the steps. The night was dark and there was no light either in the station-house or upon the platform. The plaintiff, who was familiar with the station, walked toward the east end of the platform, and as he approached the end supposed he saw it ten or more feet ahead, when taking another step, he fell over the unprotected end at the right of the steps and broke his leg. It was held that the case was for the jury.¹

Falling from Unprotected Opening in Overhead Bridge.

414. The deceased fell from an opening left in the side of an overhead bridge at a station. It appears that a stairway led from the station to the bridge. In making some alterations in the station, defendant's contractor had removed the stairway and replaced it by a narrower one, leaving a space between the end of the hand-rail and the narrower stairway. It was intended to extend the hand-rail so as to fill up the space, but this had not as yet been done. On the afternoon of the day before the accident, some of the contractor's workmen had placed a board across the opening, but this board had been removed by some unknown person. The deceased crossed the bridge in the evening and descended the stairway to buy a ticket for a train which he intended to take the next morning. After purchasing his ticket he re-ascended the stairs and stopped to speak to some friends. While doing so he inadvertently stepped through the opening and was killed.

¹ *McCollin v. Philadelphia & West Chester R. R.*, 1 Del. Co. R. 445 (1883).

The stairway was within the control of the defendant company, and was open for all persons going to and from the station. It was held that the case was for the jury.¹

Crossing Tracks at Station.

415. A person who runs across the tracks at a station, without stopping or looking, under the mistaken belief that his own train was just starting, is guilty of such contributory negligence as will not entitle his family to recover damages for his death.²

Plaintiff and four companions, on November 24, 1874, were waiting at the station, on the west side of the road at Bristol, for the seven o'clock evening train for Philadelphia. There were two tracks; the down train was on the east, and the up train on the west. The station was for both trains; both trains stopped there for passengers in their ordinary business. The down train was behind time about thirty minutes, and the plaintiff had been so informed. About 7.30 o'clock some one called to the plaintiff and his companion: "The train is coming; you have only a minute." They hurried out on the platform, and when about to step upon the track, James Fine, a witness for the plaintiff, said to them: "You had better wait, here comes the train up." All were stopped by this warning except the plaintiff, who continued on, and was struck by the approaching train and thrown between the two tracks. Some of his companions, when warned, looked up and saw the train about twenty feet away. It was dark, and the up train had a head-light, but gave no other signal. It stopped about "a car and a half's length" from where the plaintiff was struck. The plaintiff did not look up or down the track before cross-

¹ *Gilmore v. Philadelphia & Reading R. R.*, 154 Pa. 375 (1893).

² *Irey v. Pennsylvania R. R.*, 132 Pa. 563 (1890).

ing. It was held that plaintiff was not entitled to recover.¹

Plaintiff, a passenger, was injured while crossing the tracks at a station at about seven o'clock in an evening of October. He was standing on the platform of the station. A train was going east. He looked down the track eastward and saw no locomotive light and no train coming westward. Immediately after looking eastward he faced the other way and walked ten or fifteen feet to a pavement, intending to cross the north track and go around the caboose on the rear end of the train going eastward, on the south track. As he stepped on the north track a train coming west struck him and caused the injuries. He did not look just at this time. There was evidence that the engine of the train going west did not sound any alarm whistle or ring a bell. A witness for plaintiff testified that the west-bound train was standing in the depot, or a little below it, when the plaintiff was on the platform, and that when he got on the track he was in the light of the head-light. The above facts having been given in evidence by plaintiff, it was held that the court below was right in entering a judgment of non-suit. The court said: "It is in vain for a man to say that he looked and listened, if, in despite of what his eyes and ears must have told him, he walked directly in front of a moving locomotive, and the injury received was attributable solely to his own gross carelessness."²

Plaintiff lived at Paoli, and it was his custom to take the 5.55 A. M. train from that place to his business in Philadelphia. At Paoli station there are three tracks, the south track, on which trains for Philadelphia run, the middle track used for various purposes, and the north

¹ *Anderson v. Railroad Co.*, 12 Phila. 369 (1877).

² *Carroll v. Pennsylvania R. R.*, 2 Pennypacker, 159 (1882).

track for trains going west. The 5.55 A. M. train, from Paoli east started from this point. The engine and cars remained over-night in a yard west of the station and north of all the tracks. On coming out of the yard in the morning, the train was carried by a switch across the north track to the middle track, and it passed east on this track some distance beyond the station, where it switched on the south track and backed up to the station. The station is south of the tracks, and a shed or shelter is on the north. A bridge extends over all the tracks, a few feet west of the station, and is reached on either side by steps leading to it. Between the south and middle tracks is a wooden fence, extending about seventy yards east of the station. Plaintiff lived south of the railroad, and had taken this train for the city almost every morning for a year, and was familiar with the station and its surroundings. On the morning of October 24, three days before the accident, he arrived at the station one minute before the starting time, and found his train standing on the middle track. At the request of the conductor he passed around the east end of the fence and got on the train where he found it standing. On the day of his injury, October 27, he reached the station one minute or less before the time the train started. He saw a train standing on the middle track, and, supposing it was the train he was to take, stepped from the platform, crossed the south tracks, and walked eastward on the road-bed, between the tracks of the fence, to reach the end of the latter, in order to pass around it. The train for the city had passed eastward on the middle track, and been turned on the south track, and was backing to the station before he started, but was not in sight, because of an embankment at a curve of the road. Before reaching the end of the fence he met this train, and was struck by it and severely injured. The

morning was dull and rainy, and he walked with his head down, and carried an umbrella, which obstructed his view of any object in front. It was held that plaintiff was guilty of contributory negligence and could not recover from the railroad company.¹

But no presumption of negligence on the part of a passenger arises from crossing a track at a railroad station, in order to get to and take passage upon a train upon another track, if that is the only way by which such train can be reached. Plaintiff testified that when he heard his train coming he went out to the station platform, looked to the east and listened, and, finding no indication of a train from that quarter, he walked in a diagonal or "angling" direction across the nearest track to meet his train, coming from the west. The space between the tracks was planked for some distance in front of the station, for the convenience of passengers who were expected to use this way of getting to and from cars. Plaintiff further testified that the engine of his train was in front of the station when he started, and by the time he reached his point, the front steps of the second passenger car, the train was standing still. It took him eighteen seconds to walk the intervening distance. From the station there was a view east along the track for about four hundred and fifty feet; and a train going at fifteen miles an hour, the speed of the freight train, as testified to by some of the witnesses, would cover that distance in about twenty seconds. There was also evidence on behalf of the plaintiff that the freight train, by which he was struck, gave no signal of its approach. It was held that the question of plaintiff's contributory negligence was for the jury.²

An elderly woman, sixty-six years of age and very

¹ *Foreman v. Pennsylvania R. R.*, 11 Pa. C. C. R. 475 (1892).

² *Kohler v. Pennsylvania R. R.*, 135 Pa. 346 (1890).

fleshy, alighted on a station platform and walked toward the steps. It was averred that she asked the conductor whether she would have time to cross in front of the train, and was told by him that he did not know. Other passengers were crossing at the time, and she followed them across the track by a path which was much frequented. Before she had passed entirely over the track she was struck by the engine of the train from which she had alighted, and so injured that she subsequently died. The evidence was conflicting as to the exact position of the engine when she started across; as to whether she was on the track when the train moved; and as to whether any signal was given or bell sounded. It was held that it was proper to submit the question of negligence and contributory negligence to the jury.¹

Getting on Train.

416. To attempt to get upon a railroad train while the train is in motion is negligence *per se*. Plaintiff testified that her husband had gone on an excursion train, which left Scranton at eight o'clock in the morning to go to Hiawatha Island, expecting to return about the same time in the evening; also that he bought his ticket for the round trip from one of the members of the lodge. All of the testimony established that in the evening, on the return, the train stopped at Nicholson Station, and, in consequence of some defect in the pump of the engine, it became necessary to attach another engine in front of the train. For this purpose the train was backed up above the station, past a switch over which the second engine could run on the track, and then back up and be attached to the train. All this was done, and the train then started and ran on without stopping at the station. While

¹ Delaware, Lackawanna & Western R. R. v. Jones, 123 Pa. 308 (1889).

the change was being made a number of the passengers left the train and stood upon the platform for some little time. Among these was the plaintiff's husband. After the train had stood a short time at the depot, the conductor called out, "All aboard," twice, and many of the passengers got on. Then the train started to back up, and, after the engine was attached, started to go on the return. The train was passing the depot at a moderate rate of speed, estimated at four or five miles an hour, when the deceased moved toward it and attempted to get on. It was held that plaintiff was not entitled to recover for her husband's death.¹

A railroad company is bound to allow a passenger a reasonable time to get upon a train. Two railroad companies had a running arrangement by which their trains met at a junction, and passengers were received from each other on through tickets, trains stopping on opposite sides of the platform. Plaintiff had a through ticket, and desired to change at the junction. The conductor of the train, however, signaled to the conductor of the other train that he had no passengers to be transferred. Plaintiff hastened to cross the platform and attempted to enter the other train, but being encumbered with a valise, a bundle, and a coil of pipe on his arm, he missed his footing and fell to the track, and his right arm was crushed by the wheels of the car. The court held that under the circumstances, plaintiff was not guilty of contributory negligence, even if the train was moving when he tried to get on. AGNEW, J., said: "The fact appears to be clear that a reasonable time for the transfer was not given, and that the plaintiff, with all his efforts to make haste, was unable to make the connection in consequence of this want of time. Now, though the train was distinctly

¹ *Bacon v. Delaware, Lackawanna & Western R. R.*, 143 Pa. 14 (1891).

in motion, so that a bystander, cool and unconcerned, could see it visibly running on the track, that a passenger, having a right to go on the train, and seeing himself about to be left improperly by the wayside, is guilty of culpable legal negligence, if he should essay to reach his destination, no matter how slow the motion in running might be, or how little danger was apparent to him? He may be guilty of negligence, but of this the jury should judge under the circumstances. He may not 'set his life or limbs on the hazard of a leap at the running train,' as the judge emphatically said, and doubtless if such were the character of his attempt, it would be negligence. The expression, 'leap at a running train,' denotes a higher effort and less consideration on the part of the traveler than merely attempting to board a car under way. In the former, a jury might discover negligence, while in the latter, they might not, in view of the circumstances, discover any. In discussing the conduct of the passenger merely, we are not to lay out of sight the wrong of the company, in its influence upon his mind act. He may have strong motives to reach his destination indeed, no man but must feel, and feel strongly, at being left by the wayside; he is conscious of his right to go aboard, and naturally becomes excited at the sight of the moving train, perhaps is alarmed, and in some degree confused. If the train be running slowly, and the danger is not apparent to him, what so natural as that he should hurry to reach the train, and to get aboard? But if we lay down the inexorable rule for this and every other case, that whenever the train can be seen to be distinctly running, it is legal negligence to attempt to get on, we set a premium on the wrong of the company, which influenced the very act itself."¹

¹ Johnson v. West Chester & Phila. R. R., 70 Pa. 357 (1872).

Plaintiff, a passenger, in attempting to pass from the platform of the station into a car fell between the steps of the car on the platform, and was injured. She testified that as she was about to step on the car, a brakeman pushed ahead of her with a spring, on to a higher step, which prevented her from obtaining a secure foothold and by the start he gave her caused her to take too short a step. The brakeman denied that he pushed ahead of her, and stated that she made a short step, or stepped on her dress, and that when she fell he assisted her to her feet, and that he followed behind her up the steps. The court in charging the jury, stated that plaintiff testified that she was pushed or jostled by the brakeman. It was held that this was unauthorized by her evidence and that it was sufficient ground to reverse the judgment.¹

Alighting from Train—Trains Must be Stopped a Sufficient Time.

417. Trains must be stopped a sufficient length of time to enable passengers to alight in safety, and if a passenger is injured in consequence of the train not stopping long enough to enable him to alight, the company is liable in damages. A woman accompanied by her three children proceeded to alight at an intermediate station, and two of the children had reached the platform, when the train started. The mother sprang upon the platform on which the third child had fallen prostrate, and was injured. A judgment against the company for \$1,383 was sustained.²

Plaintiff, a passenger, was injured while attempting to alight from a train. She testified that as she was approaching the door of the car, she was held back by in-

¹ Philadelphia, Wilmington & Baltimore R. R. v. Alvord, 128 Pa. 42 (1889).

² Penna. R. R. Co. v. Kilgore, 32 Pa. 292 (1858).

coming passengers, that as soon as possible she crowded her way through them on to the platform, and had gone down a step or two, and was in the act of stepping with her foot raised, when the car started and threw her to the ground. Witnesses for the company testified that the train was in motion when plaintiff began to descend the steps, and the brakeman testified that he warned the plaintiff not to alight, and informed her that he would stop the train. Notwithstanding this warning, plaintiff jumped, and in so doing was thrown down and sustained the injury complained of. It was held that the case was for the jury; and a verdict and judgment for the plaintiff was sustained upon appeal.¹

A passenger was injured while alighting from a train. He described the accident as follows: "I purchased a ticket for W. As the train got right opposite the station, I rose out of my seat and walked to the door, expecting the train to stop at the depot. I got out on the platform and stepped down on the step. I turned to retrace my steps, when a sudden jerk of the car broke my hold. I had a dinner basket on my wrist. I had a hold on one of the braces of the platform, and the sudden jerk wrenched my hold. I went down, struck on my head, and dislocated my shoulder. They ran up above the platform, which is two hundred and fifty feet. The station is a small building near the centre of the platform. They ran about twenty-five to thirty yards. The rear car stood above the platform." He further testified that the train passed the station at a rate of six or eight miles an hour. The court held that there was no error in entering a non-suit.²

Plaintiff, a large and corpulent man about seventy

¹ *Enches v. New York, Lake Erie & Western R. R.*, 135 Pa. 194 (1890).

² *Blue v. Pennsylvania R. R.* 1 Mona. 757 (1889).

years of age, took passage on the train for Port Matilda Station. The cars were well filled with passengers, but he found a seat at the forward end of the passenger compartment of the smoking car, about thirty-five feet from the door through which it was necessary for him to make his exit. As soon as the train stopped at Port Matilda he arose and made his way through the cars as speedily as possible, but when he reached the door he was delayed by a group of passengers who had boarded the train as soon as it stopped and before those desiring to leave had either time or opportunity to do so. He was obliged to push his way, as best he could, past those who obstructed the doorway and platform. When he reached the last, or next to the last step leading down from the platform, he discovered the train had commenced to move. The impetus acquired in leaving the car rendered it difficult, if not impossible for him then to retrace his steps. Testifying as to his situation, when he first discovered the train was in motion, he says: "Then I could not take myself back again." In the language of one of the witnesses, "he seemed when he got to the last step as though he was going to stop; he stepped as though he was afraid to go, but by that time he had got too far and stepped off the end." The result was that he was thrown upon the ground and sustained the serious injuries complained of. The train was held at the station an unusually short time, about twenty-five or thirty seconds. Those who wished to enter were permitted to do so before reasonable time or opportunity was allowed for passengers to safely leave the car. It was held that the case was for the jury.¹

If the testimony is conflicting as to whether a train stopped a sufficient length of time to permit a passenger to alight with safety, the question is for the jury. In such

¹ Pennsylvania R. R. v. Peters, 116 Pa. 206 (1887).

a case testimony on the part of the plaintiff was that the train stopped from ten to twenty seconds; on the part of the defendant, that it stopped a minute, and that from ten to fifteen passengers, mostly ladies, got off the train, and one or two passengers got on it, while it was at rest. It was held that it was for the jury to determine upon the whole evidence, whether the train stopped a reasonable and proper time to allow the passengers to alight in safety.¹

Plaintiff was on a train that reached the station where she desired to alight after dark. She testified that she started out of the car with a number of packages, and when she reached the steps, she became aware that the train was moving. She testified: "I opened the door and walked out, and was on the steps, when I became aware that the train was moving. I saw that we were passing the lights in the depot; that was what made me aware that it was moving. There was no brakeman or conductor to be seen, and there was no light, because we had passed the depot. It was very dark, dark as night could be; there was not even a star. In my right hand I had my umbrella and satchel; in my left, the valise. I have no recollection of making any effort to get off. The next thing I remember, I was lying on the ground, and heard the voices of two or three men who had just approached. The depot agent came then with his light. I could not tell whereabouts on the steps I was; I cannot remember. I had not hold of anything. I did not have hold of the guards. It was only an instant, and I still had hold of my baggage. I did not lose consciousness. I fell forward with the right arm extended, and it was dislocated at the shoulder. I did not fall toward the engine. I fell just straight forward from the steps."

¹ Pennsylvania R. R. v. Lyons, 129 Pa. 113 (1889).

There was no testimony that plaintiff stepped or jumped off the train. Evidence for the defendant was to the effect that the train made the ordinary stop. The court charged that if the plaintiff stepped down or jumped from a moving car, she could not recover, unless she had reason to apprehend greater danger from remaining on the train, or the suddenness of the danger rendered her incapable of exercising proper judgment. A verdict and judgment for plaintiff was sustained.¹

Passenger Must Not Jump from Moving Train.

418. As a general rule it is negligence in a passenger to jump from a moving train. But to this general rule there are exceptions. When the passenger is placed in default or negligence by the company, or when he leaves the train while it is in motion, by direction of the company's agents, it is for the jury to say, upon the evidence, whether the act was negligent or not. In such cases all the circumstances, including the speed of the train at the time of leaving it, must be considered.²

If a passenger alights from a train while in motion, in spite of the fact that he is warned by a fellow-passenger not to alight, the passenger cannot recover for injuries sustained.

Plaintiff, in alighting from a train, was injured while alighting from a train. The evidence showed that two passengers on the same train, who saw her descending the step, went to and warned her not to attempt to leave the car until it had stopped. She, disregarding the warning, left the train while it was moving, and, in consequence, was injured. The court held that the plaintiff

¹ *Leggett v. Western New York & Pennsylvania R. R.*, 143 Pa. 39 (1891).

² *Pennsylvania R. R. v. Lyons*, 129 Pa. 113 (1839); *New York, Lake Erie & Western R. R. v. Enches*, 127 Pa. 316 (1889).

was bound to heed the warning, although it was given by passengers, and not by employees of the company. The court said: "It did not matter who pointed out her danger to her. It was enough if her attention was drawn to it. It then became her duty, not to obey any particular person or direction, but to avoid the danger of which her attention was called, and not to do so was negligence."¹

If a passenger attempts to alight from a train after it has begun to move, and after two other passengers upon the same platform have been thrown down in alighting, he is guilty of such contributory negligence as will prevent him from recovering damages from the railroad company.²

Alighting on Wrong Side of Train.

419. If a passenger neglects the necessary regulations of the company in alighting from a train, he cannot recover damages if injured.

Thus, if a passenger alights from the side of the train opposite to the platform provided by the company, and is struck by a train on the other track, he cannot recover.³

If a person alights on the side of a train opposite the platform and is injured, it is improper to admit evidence that persons were in the habit of getting off of the train on that side.⁴

The deceased and his companion took passage on the local train at Trenton for Penn Valley Station, for the purpose of hunting. The testimony tended to prove that after leaving Morrisville, the first station east of their destination, "Penn Valley" was announced as the next

¹ Kilpatrick v. Pennsylvania R. R., 140 Pa. 502 (1891).

² Brown v. Allegheny Valley R. R., 151 Pa. 562 (1892).

³ Pennsylvania R. R. Co. v. Zebe, 33 Pa. 318 (1858).

⁴ Pennsylvania R. R. Co. v. Zebe, 37 Pa. 420 (1860).

station; that shortly afterward the train "slowed up" and stopped in front of a platform and station-house on which was painted, over the door, "Penn Valley Station;" that as soon as the cars stopped, the deceased, somewhat encumbered by his dog and gun, left the car on the left side for the purpose of crossing the track and thus reaching the platform. Just as he alighted the east bound express for New York came along at a rapid rate of speed, struck and instantly killed him. It was also shown that on the opposite or north side of the track, and a short distance westerly, there was another platform and station at which way-passengers were regularly received and discharged; but, it did not clearly appear that the deceased was aware of this, nor of the fact that the way-train slowed up and stopped before reaching its regular station, on the right, for the purpose of giving the express train a clear track, to which it was entitled at that point. It was held that the question of the deceased's contributory negligence was for the jury. A verdict for plaintiff was sustained.¹

Where a passenger has alighted from a train and the contract of carriage has been completed, the measure of responsibility of the company for an injury is different. Thus, if a passenger alights from a train and while stepping on to the second track is struck by another train, the company is entitled to have the question considered by the jury whether their relation to the person injured as a common carrier had not ceased.²

If a railroad company provides a safe and convenient platform upon one side of its track, it is notice to a passenger of the regulation of the company requiring passengers to get off of the train upon the platform. If a

¹ Pennsylvania R. R. v. White, 88 Pa. 327 (1879).

² Pennsylvania R. R. Co. v. Zebe, 33 Pa. 318 (1858).

passenger with knowledge of such a platform, voluntarily alights upon the other side of the train and falls into an excavation made by the railroad company, he cannot recover damages for the injuries which he may sustain. In such a case McCOLLUM, J., said: "A passenger's consent to a reasonable regulation of the company for entering and leaving its trains, is implied, and for an injury which results from his voluntary disregard of it the company is not liable: *Sullivan v. Railroad Co.*, 30 Pa. 234. In the present case it affirmatively and sufficiently appears in the testimony produced by the appellant that the company had provided safe and convenient means of ingress and egress to and from its trains, and in this particular had discharged its whole duty to its passengers. It was under no obligation to them to provide a convenient place to alight on the north side, nor to keep its right of way there free of obstructions for the benefit of pedestrians. It was not bound to anticipate and guard against the consequences of a violation by its passengers of its reasonable and known regulations for their protection. It is admitted by the appellant that his observance of these regulations would have insured his safe exit from the train, and it is obvious that the injury he received was the direct consequence of his disregard of them. It was his neglect of a duty he owed to the company, and not its neglect of a duty it owed to him, which caused the injury, and it is a sufficient answer to his demand that the company shall compensate him for it. This is the rule distinctly laid down in *Sullivan v. Railroad Co.*, *supra*, and enforced in *Penna. R. R. Co. v. Zebe*, 33 Pa. 318, and 37 Pa. 420.

"In this case there was nothing to justify or excuse the appellant's deliberate disregard of the rules of the company. It was prompted by a desire to shorten the walk

from the train to his destination. A moment's time and a few rods in distance were all that he could save by it, and neither was of unusual importance to him. It was claimed and proved that the company had permitted persons residing north of its road to cross its right of way and track on foot, at different points in the vicinity of the depot, in going to and returning from their work or business in other parts of the town. But in this there was no waiver of its regulations affecting its passengers, nor permission to them to alight on the north side."¹

Plaintiff, a passenger, alighted at an ordinary stopping-place, without station or platform. At this point the company's road consisted of two tracks, four feet apart. Plaintiff stepped down into the four-feet space between the tracks, and started to cross the southern track, when he was struck by a train going at a high rate of speed. Plaintiff testified that before leaving the train he had looked and listened, but had not heard any train approaching. It was held that as it was clear that plaintiff had voluntarily walked directly in front of a moving locomotive, he was not entitled to recover.²

A passenger alighted from a railway train in the daytime, at a regular stopping-place, to discharge and receive passengers, but which was not supplied with a station-house or a platform. He stepped off on the side, on which was another track, and was injured by a passing train. Plaintiff gave as the reason of his alighting on the track side was that the step on the other side overhung a ditch. He also testified that the train stopped on a curve, so that he could not see around the engine of the train from which he was alighting, but that he looked up and down the track, and seeing and hearing nothing, started to

¹ *Drake v. Pennsylvania R. R.*, 137 Pa. 352 (1891).

² *Morgan v. Camden & Atlantic R. R.*, 23 W. N. C. 189 (1889).

cross, when he was struck. Witnesses testified that no signal was given by the approaching train. Witnesses, produced by the plaintiff, gave evidence which tended to show that the plaintiff stepped down immediately in front of the approaching train. The judgment of compulsory non-suit was sustained, the Supreme Court saying: "Had the plaintiff used his eyes, he could not have failed to see the approaching train, and at a sufficient distance to avoid the accident. There was neither allegation nor proof that it was unsafe to get off on the side where passengers usually alighted, and if, to avoid it, the plaintiff voluntarily got off at a known place of danger, he has no one to blame but himself."¹

Alighting at Dangerous and Unusual Place.

420. Plaintiff, a woman sixty years of age, was injured while alighting from a train upon which she was a passenger. There was only one passenger coach on the train, and this was preceded by four flat cars. At the time of the accident deep piles of snow were on both sides of the platform. When the train arrived at the station of the terminus of the road, plaintiff alighted at a place where the brakeman had beat down the snow, and stood there until an engine should remove the flat cars which obstructed her passage along the track. After remaining in that position for some she objected to remaining there longer. The brakeman then suggested that if she would pass over the four flat cars, she could leave the train that way, and that there was no other way for her to go. She thereupon proceeded over the cars successfully until she came to the place for alighting, and in attempting to get down from the car her clothes caught in the coupling pin,

¹ *Morgan v. Camden & Atlantic R. R.*, 1 Mon. 122 (1889).

and she fell and sustained her injuries. It was held that the case was for the jury.¹

Deceased was a passenger on a train from Philadelphia to West Chester. The night was dark. There was no light in the car, and the train was crowded with passengers. Just before the train reached Wawa Station the conductor passed through the car and announced that passengers for West Chester and intermediate stations would change cars at Wawa Station. Shortly afterward the train stopped, not at the station, but upon a bridge. No announcement was made that the train had not reached the station, and the deceased, who was a passenger, stepped off in the darkness, fell through the bridge, and was killed. Under such circumstances it was not error to submit the question of negligence of the defendant company to the jury.²

A passenger bought a ticket for Jenkintown, and took his seat in the front car near the front door. After the train started, some one called out: "The next station is Jenkintown." Shortly afterward the train came to a stop and a person in a uniform, similar to the conductor's uniform, came out of the baggage-car and called out "Jenkintown." The passenger then went out of the car and while in the act of stepping down from the lower step of the platform, he placed one foot upon the ground, and then stepping with the other foot fell through a bridge. The night was dark. He testified that he went out of the car in a great hurry and did not see any station or any lights. There was evidence for the defendant company that the train was stopped before reaching the station on account of an accident to another train, and

¹ *Hartzig v. Lehigh Valley R. R.*, 154 Pa. 364 (1893).

² *Philadelphia, Wilmington & Baltimore R. R. v. McCormick*, 124 Pa. 427 (1889).

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1993-1994

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

1. *Chlorophyll a* and *Chlorophyll b* were determined by the method of Arar and Collins (1971) using a Shimadzu 1601 UV-Visible Spectrophotometer.

1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the 20th century. The population of the United States has increased from about 100 million in 1900 to over 200 million in 1950, and the majority of this increase has been in urban areas. This has led to a concentration of population in a few large cities, which has in turn led to a number of problems, such as overcrowding, pollution, and traffic congestion.

"...and I have been thinking about you ever since."

Riding in Baggage-Car.

423. A passenger who voluntarily leaves his proper place in the passenger car and, in violation of the rules of the company, rides in the baggage-car, and is injured in consequence of such violation, cannot recover damages from the company. In such a case PAXSON, J., said: "The baggage-car is a known place of danger. In this respect it differs from the cow-catcher and the platform only in degree. It is placed ahead of the passenger cars and next to or near the locomotive. In cases of collision it is the first car to give way to the shock, and frequently is the only one seriously injured. It is treated as dangerous by the rules of all well-regulated companies, and the rule of the defendant company emphatically declared it to be so. An infant or an idiot might be excused for riding in such a position, by reason of his lack of mental capacity, but an intelligent man, accustomed to railroad travel, must be presumed to know its danger. It is patent and the same under all circumstances. Can a passenger who voluntarily leaves his proper place in the passenger car, in violation of the rules of the company, to ride in the baggage-car, or other known place of danger, and who is injured in consequence of such violation, recover damages for such injury? We are not speaking of a possible accident: the result of a brief visit to the baggage-car to give some needed direction about a passenger's luggage, to have it re-checked, or for any other legitimate purpose, but of a person who rides in a baggage-car in violation of a known rule of the company, and who is injured in consequence of such violation. In considering this question regard must be had to the character of the rule violated. The rules adopted by railroad companies are a part of their police arrangements. Some of them are for the convenience of the company in the man-

agement of its business. Others are for the comfort of passengers, and yet others have regard exclusively to the safety of passengers. The distinction between them, and the difference in the consequences of their violation is manifest. As an illustration: It would be unreasonable to hold that the violation of the rule against smoking could be set up as a defense to an action for personal injuries resulting from the negligence of the company. On the other hand, should a passenger insist upon riding upon the cow-catcher, in the face of a rule prohibiting it, and as a consequence should be injured, I apprehend it would be a good defense to an action against the company, even though the negligence of the latter's servants was the cause of the collision or other accident by which the injury was occasioned. And if the passenger thus recklessly exposing his life to possible accidents were a sane man, more especially if he were a railroad man, it is difficult to see how the knowledge or even the assent of the conductor to his occupying such a position could affect the case. There can be no license to commit suicide. It is true the conductor has control of the train, and may assign passengers their seats. But he may not assign a passenger to a seat on the cow-catcher, a position on the platform or the baggage-car. This is known to every intelligent man and appears upon the face of the rule itself. He is expressly required to enforce it and to prohibit any of the acts referred to, unless it be riding upon the cow-catcher, which is so manifestly dangerous and improper that it has not been deemed necessary to prohibit it. We are unable to see how a conductor, in violation of a known rule of the company, can license a man to occupy a place of danger so as to make the company responsible. It is otherwise as to rules which are intended merely for the convenience of the company or its passengers. It was

said by WOODWARD, J., in *Sullivan v. The Railroad Co.*, *supra*, that 'on the part of the passenger, his assent is implied to all the company's reasonable rules and regulations for entering, occupying, and leaving their cars; and if injury befall him by reason of his disregard of regulations, which are necessary to the conduct of the business of the company, the company are not liable in damages, even though the negligence of their servants concurred with his own negligence in causing the mischief.' This principle is even broader than the one we are now contending for. We only assert here that if a passenger willfully violates a known rule intended for his safety, and is injured in consequence of such violation, he is not entitled to recover damages for such injury. We are not aware that the foregoing views conflict with any of our own cases. They may not harmonize with some of the dicta which lie scattered through them, but a careful examination of the points decided shows no serious embarrassment. In *O'Donnell v. The Allegheny Railroad Company*, 59 Pa. 239, one of the cases relied upon to sustain the contrary view, the court below instructed the jury, as we gather from the opinion of AGNEW, J.: 'Summing up the doctrine of the court as found in the answers to the points, it was this: That the baggage-car is an improper place for a passenger, and whether the rule of the company forbidding him to be there is known to him or not, his own intelligence should teach him that it is not his proper place; and if he leave his seat in the passenger car to go into the baggage-car, he is guilty of negligence; that nothing less than a direction or an invitation from the conductor to go there will excuse this negligence, and such direction or invitation should not be inferred from the mere fact that he had been accustomed to ride frequently in the baggage-car, with the

knowledge of the conductor and without objection. The judge therefore instructed the jury that if the plaintiff left the passenger car without the direction of invitation of the conductor, he did what no passenger has a right to do, even though he had been accustomed to ride there with the knowledge of the conductor and without objection.' It will be noticed that this court did not deny the correctness of this ruling as an abstract proposition. It was merely held that it was not correct as applied to the facts of that case. It was said by the court: 'In view of the evidence this instruction was erroneous.' What was the evidence? Again I quote from the opinion: 'The plaintiff had been riding in the baggage-car for about two months. Murphy, the conductor, himself admitted, that Liston's men rode frequently in the baggage-car without his objecting; that he never ordered them out. When they got on the car they generally remained there without objection; that he had no recollection of requesting them to go into the passenger car, and that he had not at any time requested the plaintiff to leave the baggage-car. The reason for this is obvious. These hands, though passengers on the train from the terms of their employment, still retained the outward appearance of employees. They were in their working clothes, which owing to their employments, were doubtless often soiled and filled with perspiration. They were probably at times not considered traveling companions for those who sat in the passenger car, and at times the cars were probably filled. It was not at all unnatural that they, themselves, should wish, and that the conductor should desire them to travel in the baggage-car, out of the immediate presence of the passengers. Under these circumstances it cannot be justly said of them, as of ordinary passengers, that any one who is possessed of sufficient intelli-

gence to travel should be held to know that the baggage-car is not an appropriate place for passengers, nor to say, although the consent of the conductor to riding there, be inferred from these facts, yet it does not follow that the company is liable, unless it is shown that they were there at the invitation or by the direction of the conductor.' And in concluding his opinion the learned judge said: 'From the evidence in this case the jury might reasonably conclude that O'Donnell was in the baggage-car with the permission of the conductor, and for the benefit of the company, and was rightfully there at the time of the accident.' It will be observed that the case was put mainly upon the ground that the plaintiff and his co-employees had been riding in the baggage-car daily for two months under circumstances which would justify the jury in finding that it was an arrangement for the benefit of the company. It may be conceded that if a baggage-car is used as a passenger car for months, the full measure of responsibility would attach. There is nothing of the kind here. The deceased was riding in the baggage-car for his own convenience, and to have a chat with the baggage-master, with whom he appears to have been intimate. The assent or even the knowledge of the conductor was not shown. The jury were allowed to guess at it by reason of the submission of this question of fact upon clearly insufficient evidence. In *Lackawanna & Bloomsburg R. R. Co. v. Chenewith*, 52 Pa. 382, there was a violation of the rules of the company, but it was a rule that had no relation to plaintiff's safety as a passenger. He induced some of the company's employees, in the absence of the superintendent, to attach his freight car to a passenger train, agreeing to run all risks, and to attend to the brakes on his own car. The engine ran over a cow, by means of which the plaintiff

was injured. It is manifest the facts of this case have no analogy to that of a passenger who leaves his seat in the cars, and rides in a known place of danger, in violation of the company's rules. The court evidently had this view, for it was said by Mr. Justice THOMPSON, in delivering the opinion: 'If a passenger puts himself out of place, and in a place of danger, and is injured as the result, this is *damnum absque injuria*, and he cannot recover.' The recent case of *Creed v. Pennsylvania Railroad Co.*, 86 Pa. 139, also rests upon an entirely different state of facts. There the deceased was riding in the caboose car, at the rear end of the train, in violation of the rules of the company. But it nowhere appeared that the rule violated was intended for the safety of passengers, nor was it even alleged that the caboose was a place of danger. On the contrary, it was said by Mr. Justice GORDON: 'No presumption of negligence can arise, either in fact or in law, from the fact of Creed's occupancy of the caboose, for there is no evidence that it was in any degree more unsafe than any other car in the train. It was, indeed, under all ordinary circumstances, the one that was the most safe: from collision in front of the train it was protected by the cars which preceded it, and from dangers behind, being itself a lookout, it was guarded by the constant vigilance of the employees.' The distinction between this case and the one in hand is so palpable that further reference to it is unnecessary."¹

A baggage-car is not an appropriate place for passengers, and if a passenger is injured by riding in such a car he cannot ordinarily recover. The rule, however, is not invariable. Thus if a person employed by the railroad company as a bridge builder has been permitted for sev-

¹ *Pennsylvania R. R. v. Langdon*, 92 Pa. 21 (1879).

eral weeks to ride to and from his work in a baggage-car, the railroad company cannot claim to be relieved from liability for injury to such person by reason of his riding in a baggage-car. AGNEW, J., said: "These hands, though passengers on the train from the terms of their employment, still retained the outward appearance of employees. They were in their working clothes, which owing to their employments were doubtless often soiled and filled with perspiration. They were probably at times not considered pleasant traveling companions for those who sat in the passenger cars, and at times the cars were probably filled. It was not at all unnatural that they themselves should wish, and that the conductor should desire them to travel on the baggage-car out of the immediate presence of the passengers. Under these circumstances it cannot be justly said of them as of ordinary passengers, 'that any one who is possessed of sufficient intelligence of travel should be held to know that the baggage-car is not an appropriate place for passengers,' nor to say although the consent of the conductor to riding there may be inferred from these facts, yet it does not follow that the company is liable unless it is shown that they were there at the invitation or by the direction of the conductor. It is undoubtedly the right of the company to prescribe reasonable rules for the regulation of those who travel as passengers on the cars: *Sullivan v. Philadelphia & Reading Railroad Co.*, 6 Casey, 238; *Powell v. Pennsylvania Railroad Co.*, 32 Pa. 416; *West Chester R. R. v. Miles*, 55 Pa. 209. But the right to regulate is not to be carried to an unreasonable extent, or to make one regulation conflict with another. It is no doubt a proper rule that passengers shall not travel in a baggage-car, but it is well known that the conductor is the person to administer the rules of the company and to

apply them according to the circumstances. The passenger travels under his directions, and generally is bound to conform to them. The conductor acts under a general authority, and from the nature of his position must necessarily exercise some discretion. In *Lackawanna & Bloomsburg R. R. Co. v. Chenewith*, 52 Pa. 382, it was held that when the owner of a freight car attached it with the consent of the agents of the company to a passenger train, contrary to the rules of the company, he agreeing to run the risk, the company could not repudiate the act of their agents so as to free themselves from responsibility for their negligence, by which he was hurt and his car wrecked. The same principle was asserted in perhaps a stronger case, where a valuable mare was lost by using straw (which caught fire from the sparks of the engine) for her bedding in the car, contrary to the positive rules of the company: *Powell v. Pennsylvania Railroad Co.*, 8 Casey, 414; *Goldey v. Railroad Co.*, 30 Pa. 242. From the evidence in this case the jury might reasonably conclude that O'Donnell was in the baggage-car with the permission of the conductor and for the benefit of the company, and was rightfully there at the time of the accident. His right to recover for an injury arising from an unsafe track was the same when in the baggage-car as when in the passenger car. The risk attended every car which traversed the unsafe roadway, and was confined to none in particular."¹

Riding in Caboose.

424. The fact that a passenger was riding in a caboose with the consent of the conductor will not prevent his recovering for an injury caused from the negligence of the

¹ *O'Donnell v. Allegheny Valley R. R.*, 59 Pa. 239 (1868).

company, if his position did not contribute to the accident which caused the injury.¹

Riding in Mail Car.

425. A person without the knowledge or permission of the employees of the railroad company went into a car devoted exclusively to the railway mail service and in charge of one of the postal agents. He took his seat in this car, and while riding there a collision took place by which he received injuries which resulted in his death. The deceased had a mileage book good for passage on the train. No notice on behalf of the railroad company was posted in this car, but there was a notice in large type issued by the post-office department in the following words: "Employees of the railway mail service will allow no person to remain in their offices unless duly authorized. In all cases the conductor must be notified of their presence. No excuse will be received for a violation of this order." It was held that the plaintiff's representatives could not recover damages from the railroad company for his death. The decision was placed on the ground that the deceased was not a passenger, and was on the train without the consent, expressed or implied, of the company, and that accordingly the company owed him no duty.²

Riding on Locomotive.

426. Defendant, a coal company, owned a narrow-gauge railroad, and carried passengers on a locomotive operated on the road. The deceased, a passenger, was riding on the locomotive when a plug in the back of the fire-box was blown out, and the deceased was injured

¹ *Creed v. Pennsylvania R. R.* 86 Pa. 139 (1878)

² *Bricker v. Philadelphia & Reading R. R.* 132 Pa. 1 (1890).

by the escaping steam. The company owned one passenger car which was seldom used, the conductor being instructed to permit passengers to ride on the locomotive when the passenger car was not attached to the train. In such a case it was not error calling for reversal to affirm plaintiff's point that a carrier for hire is bound to furnish safe and sufficient means of transportation for its passengers when so qualified by the general charge that the jury were sufficiently well instructed that the means of transportation must be reasonably safe and sufficient, and not absolutely so.¹

Riding in Different Car from what Contract Provided.

427. A regulation by which a passenger with live stock on passenger train is required to remain on the cars which contain his stock, is not so transgressed by his being in another part of the train when it is at rest as to make him a contributor to his own injury by that train being run into by another.²

Sitting with Arm out of Window.

428. It is negligence *per se* for a passenger to ride with his elbow or arm out of a window. "A passenger on entering a railroad car is to be presumed to know the use of a seat and the use of a window; that the former is to sit in, and the latter is to admit light and air. Each has its separate use. The seat he has a right to occupy in any way most comfortable to himself. The window he has a right to enjoy—but not to occupy. Its use is for the benefit of all, not for the comfort alone of him who has by accident got nearest to it. If, therefore, he sit with his elbow in it he does so without authority; and if he allow it to pro-

¹ Millwood Coal & Coke Co. v. Madison, 2 Atl. Rep. 39 (1885).

² Pennsylvania R. R. Co. v. McCloskey's Admr., 23 Pa. 526 (1854).

trude out, and is injured, is this due care on his part? He was not put there by the carrier, nor invited to go there; nor misled in regard to the fact that it is not a part of his seat; nor that its purposes were not exclusively to admit light and air for the benefit of all. His position is, therefore, without authority. His negligence consists in putting his limbs where they ought not to be, and liable to be broken without his ability to know whether or not there is danger approaching. In a case, therefore, where the injury stands confessed, or is proved to have resulted from the position voluntarily or thoughtlessly taken in a window by contact with outside obstacles or forces, it cannot be otherwise characterized than as negligence, and so to be pronounced by the court."¹

If a passenger puts his elbow or arm out of a car window, voluntarily without any qualifying circumstances, he is guilty of contributory negligence; but the mere resting of the arm upon the window-sill without protrusion is not in itself contributory negligence.²

If a passenger falls asleep and unconsciously suffers his elbow to slip out beyond the window-sill, he is guilty of contributory negligence.³

A railroad company is not in general obliged to provide cars so constructed as to prevent passengers from putting their arms through them; but it seems that such cars must be provided where the road is so narrow as to endanger projecting limbs. In *New Jersey R. R. v. Kennard*,⁴ GIBSON, J., charged that "no car is road-worthy if the windows are not so constructed as to prevent the passengers from putting their arms through

¹ Per THOMPSON, C. J., in *Pittsburgh & Connellsville R. R. v. McClurg*, 56 Pa. 294 (1867).

² *People's Passenger Ry. v. Lauderbach*, 4 Pennypacker, 406 (1884).

³ *Pittsburgh & Connellsville R. R. v. McClurg*, 56 Pa. 294 (1867).

⁴ 21 Pa. 203 (1853).

them." On writ of error the judgment for the plaintiff was affirmed, but the court said: "The language of the learned judge who presided at the trial, seems to be too broad as a general principle, where he says that 'no car is good if the windows are not so constructed as to prevent the passengers from putting their limbs through them.' But in its application to a road which in some places is so narrow as to endanger projecting limbs, as here, the instruction is proper."

In the early and leading case of *Laing v. Colder*, the plaintiff while traveling in a car, permitted his hand to extend outside of the window, and his arm was broken in passing a bridge. The court left it to the jury to say whether the notice of the danger to the passenger was sufficient or not. *BELL, J.*, said: "Complaint is made that the court itself did not undertake to decide that the notice given by Minsker was insufficient. Had they done so it would clearly have been error; for all the cases agree that the question of negligence, including the sufficiency of a necessary warning, is for the jury, under the guidance of the court: *Curtis v. Drinkwater*, 22 Eng. C. L. R. 51; *Ware v. Gay*, 11 Pick. 106; and this is the doctrine of *Dudley v. Smith*, 1 Camp. N. P. 167, the case most strongly relied on by the plaintiff. As every instance must depend on its own circumstances, the law can but lay down the rule that such warning is to be given as will put the passengers upon their guard, leaving it to the jury to say how the fact was. This was done here. The court refused to say the warning was either sufficient or insufficient, but left that to the jury, with proper instructions. As no fault in the car in which the plaintiff was could with truth be alleged, the question of warning on the one hand, and of heedlessness on the other, was in fact the point of the case. Whether warn-

ing was given in a manner to call the plaintiff's attention to it, was fairly put by the court."¹

Acts of Other Passengers.

429. A railroad company is not liable in damages for an injury to a passenger caused by the riotous conduct of other passengers who have forced their way into the train in such numbers as to defy the resisting power at the disposal of the conductor. A railroad company is bound to furnish men enough for the ordinary demand of transportation, but it is not its duty to furnish its trains with a police force adequate to restrain a riotous demonstration. The conductor, however, must do all that he can to stop fighting and protect passengers. He should stop the train and call to his assistance the engineer, the fireman, all the brakemen, and such passengers as are willing to lend a helping hand. Until at least he has put forth the forces at his disposal, no conductor has a right to abandon the scene of conflict, and leave the passengers to the mercy of the mob.²

During a fight between passengers in a car, plaintiff, also a passenger, but not engaged in the fight, was struck in the eye by a piece of flying glass. The conductor was in the car collecting tickets while the fight was going on, and did not interfere in any way to stop it. It was held that the company was liable for the injury.³

A carrier is not bound to protect passengers merely from the rudeness of other passengers. Thus a woman is not entitled to recover damages from a railroad company for injuries received by being jostled off the platform of a car by another passenger rudely pushing by her to enter the car. In such a case WILLIAMS, J., said: "Protec-

¹ *Laing v. Colder*, 8 Pa. 479 (1848).

² *Pittsburgh, Fort Wayne & Chicago Railway Co. v. Hinds*, 53 Pa. 512 (1866).

³ *Pittsburgh & Connellsville R. R. v. Pillow*, 76 Pa. 510 (1874).

tion against bad manners is not, so far as I am aware, one of the duties owing by a carrier to its passengers. Rudeness is a breach of no positive law. The ordinary cars are, and must be, open to the masses, among whom there will be different degrees of intelligence and politeness; differences in physical vigor and temperament. There is, therefore, necessarily, a certain amount of rudeness, of haste, of selfish disregard of the nerves and of the comfort of others, to be met with wherever men and women congregate, whether upon railroad trains, in places of amusement or upon the streets of a city. Unless such conduct amounts to a breach of the peace the officers of the law can take no cognizance of it, and carriers are not bound to prevent it or liable in damages for its appearance about their stations or trains. The plaintiff was the victim of an act of rudeness. Just as she was letting herself down from the lowest step to the platform an impatient man thought he saw an opportunity to reach the interior of the car, and stepped up beside her just at the instant when a 'jostling' would disturb her poise and lead to her fall. Without intending harm, he inflicted it. It is not easy to see how the defendant could have prevented the accident by any system less comprehensive than one which should require it to escort every incoming passenger from the interior of the car to a place of safety outside its grounds; and every outgoing passenger from its waiting-rooms to a seat inside the train. Neither the common law nor the statutes of this State have imposed such a duty on the carrier, and a jury should not be allowed to do it."¹

Ejection of Passenger at Improper Place.

430. The fact that the conductor suffered the passenger to ride past several stations before ejecting him, and then

¹ Ellinger v. Philadelphia, Wilmington & Baltimore R. R., 153 Pa. 213 (1893).

put him out, remote from any shelter, and in a severe storm, may be considered by the jury in deciding whether the conductor intentionally selected this inhospitable spot, or whether it happened to be the locality of the plaintiff's persistent refusal to pay.¹

Plaintiff, a woman, was wrongfully ejected from a train at a point where there was a stopping-place but no regular station. A box-car was used temporarily as a station. A storm was approaching, but plaintiff was not informed that she could find shelter in the box-car, nor did she know that she would have been permitted to take the next train. She started to walk back to the station from which she had started, and on the way was overtaken by a rain storm and suffered in health therefrom. It was held that it was proper to leave the whole case to the jury, as there were too many elements and uncertainties in the situation for the court to decide whether the plaintiff's conduct under the circumstances was improper and negligent.²

Where Passenger is Carried Beyond Station.

431. A passenger who is negligently carried beyond the station where he intended to stop and where he had a right to be let off, can recover compensation for the inconvenience, the loss of time, and the labor of traveling back.³

A passenger who leaps from a railroad car while in motion in order to avoid being carried beyond his destination, although warned of the danger of leaping from the car, and informed by the conductor that the car would be stopped and backed to its usual stopping-place,

¹ *Vankirk v. Pennsylvania R. R.*, 76 Pa. 66 (1874).

² *Malone v. Pittsburgh & Lake Erie R. R.*, 152 Pa. 390 (1893).

³ *Pennsylvania R. R. Co. v. Aspell*, 23 Pa. 147 (1854).

is guilty of contributory negligence and cannot recover from the company damages for the injuries which he sustained.¹

When Passenger Obeys Instructions of Conductor.

432. A railroad company carrying passengers cannot allege that a passenger is in fault in obeying specific instructions of the conductor instead of the general directions of which he has been informed.²

Concurrent Negligence.

433. Where a passenger on a railroad train is injured by the concurrent negligence of the carrier and of another party, the carrier must answer for the injury. If, however, the carrier's negligence did not directly contribute to the accident, and the act of the other party was the proximate cause of the accident, the carrier is relieved, and the other party is liable. Thus, if a passenger is killed on a train which collided with oil barrels, alleged to have been placed too near the rails by the defendants, it is competent for the defendants to introduce evidence to show that the track was in bad condition, that the train was badly made up and was running at too high a rate of speed, and that in consequence the injury was due to the concurrent negligence of the railroad company and themselves. Such evidence, if true, would make the railroad company alone liable to the passenger.

In *Lockhart v. Lichtenthaler*,³ THOMPSON, J., said: "It is the policy of the law to insure safety as far as possible, to both person and property, when being carried or transported from place to place by public and common carriers. That can only be done by enforcing a strict

¹ *Pennsylvania R. R. Co. v. Aspell*, 23 Pa. 147 (1854).

² *Penna. R. R. Co. v. McCloskey's Admr.*, 23 Pa. 526 (1854).

³ 46 Pa. 152 (1864).

rule of responsibility upon those who undertake such business. I do not think, however, that the rationale of the principle that concurring negligence leaves the party to look to his employee is satisfactorily expounded in the opinions in *Thoroughgood v. Bryan*, viz.: the identity of the passenger with his own vehicle. I would say that the reason for it is that it better accords with the policy of the law to hold the carrier alone responsible in such circumstances, as an incentive to care and diligence. As the law fixes responsibility upon a different principle in the case of the carrier, as already noticed, from that of a party who does not stand in that relation to the party injured, the very philosophy of the requirement of greater care is that he shall be answerable for omitting any duty which the law has defined as his rule and guide, and will not permit him to escape by imputing negligence of a less culpable character to others, but sufficient to render them liable for the consequences of his own. It would be altogether more just to hold liable him who has engaged to observe the highest degree of diligence and care, and has been compensated for so doing, rather than him upon whom no such obligation rests, and who, not being compensated for the observance of such a degree of care, acts only on the duty to observe ordinary care, and may not be aware even of the presence of a party who might be injured. This rule, it cannot be doubted, will be more likely to increase diligence than its opposite, which would enable a negligent and faithless party to escape the consequences of his want of care by swearing it onto the other, which he would assuredly do if the temptation and opportunity offered. As this view best accords with the policy of the law, it is proof of the existence of the rule itself.

“If, in this case, there was no contributory negligence

chargeable to those conducting the train by which the cars in charge of the deceased were with himself being conveyed; in other words, if their negligence did not directly contribute to the disaster, although there may have been negligence in a general sense, the defendants will be answerable if the act of their servants or agents was the proximate cause of it. The negligence on part of the train, which would be a defense, must be directly involved in the result; it must by itself, or concurring with the defendants', be the proximate cause of the death. For instance: running too rapidly on a road in bad repair, driving instead of drawing the train, would not, abstractly, be such negligence as would be a defense. To be such, the consequence of these acts, or some of them, must have directly entered into and become active agents in the very disaster itself. This must be the rule of all such cases: 1 Sm. Lead. Cases, 365."

A railroad company is not ordinarily liable for an injury to a passenger caused by the negligence of a third party. Thus, where a locomotive operated by the owners of a private railroad runs into a passenger train at a grade crossing, and a passenger is injured, the railroad company is not liable for the injury unless it appears that the company or its employees were guilty of some negligence which contributed to the accident.¹

Where a carrier owning cars uses them on a railroad owned by the State, and the motive power of which is furnished and controlled by the State, he is liable for an injury to a passenger caused by the collision of two trains. The carrier, in such a case, contracted with full knowledge of the government road, and as between him and the passenger the means of transportation became his.²

¹ *Bunting v. Pennsylvania R. R.*, 118 Pa. 204 (1888).

² *Peters v. Rylands*, 20 Pa. 497 (1853).

CHAPTER XXXIII.

NEGLIGENCE—IMPROPER CONSTRUCTION OF ROAD-BED.

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| 434. Improper Construction of Road-Bed. | 435. Injury to a Car Belonging to a Private Owner. |
| | 436. Act of God. |

Improper Construction of Road-Bed.

434. A land-owner is entitled to damages in an action of trespass for an injury to his land caused by the improper construction of a culvert, although he has previously received damages in condemnation proceedings for the taking of his land. "Though the State's right of eminent domain is committed to the company, and it may lawfully enter and build all structures proper to accomplish the purpose of its charter without liability for damages farther than is provided for in the charter; yet this does not justify unskillfulness and unnecessary injury in the mode of performing the work, or in the character of the structures erected. The company is bound to bring to their execution the engineering knowledge and skill ordinarily known and practiced in the construction of such works. In the present case then, if the culvert was so unskillfully and negligently constructed as to be insufficient to vent the ordinary high water of the stream, the railroad company building it would have been liable for the injury thereby caused. The apparent facts indicated the duty. The stream, though small, must

find a vent or overflow the adjacent land and undermine the railroad. Its size, the character of its channel, and the declivity of the circumjacent territory which forms the water-shed indicated the probable quantity of water to be passed through. Proper engineering skill should observe these circumstances, and supply the means of avoiding the injury which would result from locking up the natural flow, or obstructing its passage so as to cause a reflux in times of ordinary high water. Beyond this, prudent circumspection cannot be expected to look, and therefore there is no liability for extraordinary floods, those unexpected visitations whose comings are not foreshadowed by the usual course of nature, and must be laid to the account of Providence, whose dealings, though they may afflict, wrong no one. If, then, there were an original wrong in the construction of the culvert, and a nuisance created thereby, the present owners of the road would be responsible for its continuance after notice."¹

A railroad company in constructing its road and works is bound to bring to their execution the engineering knowledge and skill ordinarily known and practiced in such works. There is no liability on the part of a railroad company for not constructing a culvert so as to pass extraordinary floods.²

A building was injured by a flood which was alleged to have been caused by the failure of defendant to keep its culvert in proper condition. There was evidence that two of the three barrels of the culvert was nearly closed. The court charged the jury that if the company constructed the culvert in a reasonably skillful manner, and in such a way as to vent the water in cases of ordinary freshets,

¹Per AGNEW, J., Pittsburgh, Fort Wayne & Chicago Ry. v. Gilleland, 56 Pa. 445 (1867).

²Baltimore & Ohio R. R. v. Sulphur Spring Independent School District, 96 Pa. 65 (1880).

and kept the same in proper repair, they had done all that could be asked of them. It was held that this was not error.¹

Injury to a Car Belonging to a Private Owner.

435. A railroad company is bound to keep its road-bed in sufficient repair, and if an injury happens to the car of another by reason of the bad repair of the road, the company is liable in damages. In *Cumberland Val. R. R. Co. v. Hughes*,² the owner of a car was held entitled to recover damages for an injury sustained to the car while in the custody of the railroad company, and caused by the bad condition of the road-bed of the railroad.

Act of God.

436. A railroad company is liable to maintain its culverts only to resist ordinary floods. It is not liable for a loss caused by an extraordinary flood which amounts to an act of God.³

If an act of God in a particular case is of such an overwhelming and destructive character, as by its own force and independently of the particular negligence to produce the injury, there will be no liability although there may have been some negligence in the maintenance of the particular structure. To create liability it must have required the combined effect of the act of God, and the concurring negligence to produce the injury. Thus in an action to recover damages for the destruction of a school-house by the breaking of a railroad embankment during a heavy flood, where witnesses for the railroad testified

¹ *Baltimore & Ohio Railroad Co. v. Sulphur Spring Independent School District*, 3 Pennypacker, 518 (1882).

² 11 Pa. 141 (1849).

³ *Welker v. Northern Central R. R.*, 1 W. N. C. 210 (1875).

that the force and volume of the water were so great that it would have required one hundred and twenty culverts of the size complained of, to pass off the water, the court held that evidence that the culverts were somewhat obstructed was immaterial.¹

¹ Baltimore & Ohio R. R. v. Sulphur Spring Independent School District, 96 Pa. 65 (1880).

CHAPTER XXXIV.

NEGLIGENCE—KILLING OF CATTLE.

437. Killing Cattle—Duty to Fence.
438. Agreement to Fence.

439. Acts Requiring Fences to be Built.

Killing Cattle—Duty to Fence.

437. A railroad company is not bound to fence its road, and if cattle straying on the right of way are killed, the owner cannot recover damages from the railroad company. On the contrary, the railroad company may compel the owner of the cattle to pay damages for injuries caused to the company. In the leading case of *New York & Erie R. R. Co. v. Skinner*,¹ GIBSON, J., said: "An action for such an injury as is laid in this declaration is founded in negligence, of which there was not a particle of proof at the trial. The company was using its chartered privilege in the usual way, and its act was lawful. Doubtless case may be maintained for negligence in conducting a railway train as well as in conducting any other vehicle, as was ruled in *Bridge v. The Grand Junction Railway*, 3 M. & W. 244; but what is such negligence has not been entirely determined. In *Aldridge v. The Great Western Railway*, 4 Scott, N. R. 156, s. c. 1 Dowl. N. S. 247, an action was maintained for suffering sparks to fly from the engine to a bean-stack; and this is all we have for it in the shape of decision. No doubt a company is answerable for gratuitous damage; but what evidence was there

¹ 19 Pa. 298 (1852).

of such damage in this case? Absolutely none. The testimony is consistent, and it shows that the train was going at the usual speed; that it was within three hundred feet of the spot when the cow jumped suddenly from the ditch to the track; that the engine was instantly reversed and the signal given to brake; and that alacrity could do no more. The retropulsive power at the disposal of the engineer, was applied in vain. Had he been able to stop the train in time to save the cow, he could not have done it without perilling the passengers. Granting what one of the witnesses testified, that the cow might have been seen at the distance of fifty rods by the wayside, and granting that the train might have been stopped within it; yet the engineer was not bound to stop it. He had no reason to apprehend that she would leap into the jaws of death, or that it was necessary to anticipate her.

“But high above this stand the impregnable position that a railway company is a purchaser, in consideration of public accommodation and convenience, of the exclusive possession of the ground paid for to the proprietors of it, and of a license to use the greatest attainable rate of speed, with which neither the person nor property of another may interfere. The company on the one hand, and the people of the vicinage on the other, attend respectively to their particular concerns with this restriction of their acts, that no needless damage be done. But the conductor of a train is not bound to attend to the uncertain movements of every assemblage of those loitering or roving cattle by which our railways are infested. Any other rule would put a stop to the advantages of railway traveling altogether. And for what deprive the country of one of the best improvements of this most wonderful age? For no more than to enable a

few unpastured cows to pick up a scanty subsistence in waste fields and lanes. If the bullocks, cows, horses, sheep, or swine of the neighborhood were allowed to block the way, the prohibition of intrusion by drovers or travelers, using their own means of conveyance, would be of little use. For the sake of the company and the passengers, the conductor and his subordinates will be vigilant to remove obstructions; but the protection of the property is merely incidental. If the owner of it do not attend to it, the company's servants, having their own business to mind, are not bound to do so; and he who trusts his property to the chances of accident is bound to stand the hazard of the die: *Knight v. Abert*, 6 Barr, 472, is to the point. In that case the intrusion was on woodland; in this it was on the exclusive possession of ground paid for as an incorporeal hereditament.

"So far we have treated the case as if the plaintiff's skirts were clear; but they are not. By the common law of England an owner of cattle is bound to keep them in an inclosure or in custody at his peril, for every entry by them on another's possession is a trespass; by the common law of Pennsylvania he may let them go at large without incurring liability for any entry by them on woodland or a waste field. To entertain an action for an inappreciable injury would encourage vexatious and unprofitable litigation, and be contrary to the maxim *de minimis*, which is peculiarly appropriate to the circumstances of the people here. But if such an intrusion would occasion substantial damage, the English rule would be applicable to it on the principle that the owner of a bull which has gored another's ox must pay for it. Is not the intrusion of an animal on a railway, which has a direct tendency to throw a train off the track and endanger life and member, an injury to the person involved in

the risk? It is conceded that an American company is not bound to fence its railway as an American farmer is bound to fence his fields; and this shows that persons who suffer their cattle to go upon it, do so on their own responsibility. Every English railway is fenced—not to protect it from cattle, for none are at large—but to prevent detriment or detention from other causes. In a country so new and so sparse as ours, of which the trunks of the principal railways are more extensive than the Island of Great Britain, the cost of fencing them would be greater than could be borne. The rights and responsibility of the people are shaped by the circumstances of their condition. If they will have railways, they must be content to have them in the only way they are practicable; and the English rule must be applicable to them. If an owner suffer his cattle to be at large, it must be at the risk of losing them, or paying for their transgression. The very act of turning them loose is negligence as regards any one but an owner of a forest or a waste field; and the owner of them is consequently responsible to every one else. That he is not answerable for them to a railway company criminally, like a caitiff who has laid a log or a bar across the track, is because mischief was not intended by him. But no prudent man in his predicament would be the first to make a stir about it."

In *North Penna. R. R. Co. v. Rehman*, THOMPSON, J., said: "The learned judge below left the question of due care on part of the plaintiff in regard to the cattle to the jury, telling them that if he was not guilty of negligence in that respect, or, in other words, if his field was sufficiently fenced, in which he turned his mules, and they escaped and were killed on the highway by negligence of the servants of the company, they would be liable to pay for them. In view of the authorities and reasons already

given we think this was wrong. It seems to us the company is as much entitled to a clear track at crossings, subject only to the right of travelers, as anywhere else; and if couchant or loitering cattle on such crossings have any legal right as such, I am at a loss to discover from whence they are derived. The authorities are almost universally against the assumption. I do not mean by this that they may be wantonly destroyed even in such places, or that gross negligence in regard to them will be excused. Neither would it be excused in regard to trespassing cattle on inclosed fields. They may not be killed, or their safety entirely disregarded in that case. With this reservation arising out of sentiments of humanity and social duty, the law accords; but to go further would be to release owners from the appropriate care due to such property, and to injure the community in doing so."¹

A railroad company was sued for the loss of a mule which was killed while loose upon the track by one of defendant's locomotives. The alleged negligence of the company consisted in not ringing the bell or sounding the whistle as the engine approached the crossing near which the mule was killed. A non-suit was entered which on appeal was affirmed. The court said: "If it was the duty of the engineer to blow the whistle as notice to the mule, I do not see why the mule should not be held to the rule, to 'stop, look, and listen.' To apply rules to dumb animals which were intended only for reasonable beings brings us dangerously near to the realm of absurdity."²

¹ 49 Pa. 101 (1865).

² *Fisher v. Pennsylvania R. R.*, 126 Pa. 293 (1889).

Where an action against the railroad company before a justice of the peace was trespass for killing a horse, and on appeal it was changed to assumpsit for a breach of a contract to erect and maintain a fence, it was not improper to enter a judgment of non-suit: *Reitze v. Railway Co.*, 126 Pa. 437 (1889).

Agreement to Fence.

438. Even where the railroad company has bought the right of way and agreed to fence it, but neglects to do so, the owner cannot recover damages for the loss of his cattle which strayed upon the right of way. In *Drake v. Philadelphia & Lake Erie R. R.*,¹ THOMPSON, J., said: "The loss of the cattle in this case is charged, not to willfulness or negligent conduct in running trains, but to the neglect of the company in not fencing according to their contract. This is laid as the *causa causans*, the remote cause; the proximate cause was undoubtedly the running of the trains. But could not the company have run their trains without having fenced, in accordance with their contract? They purchased the right to pass through the plaintiff's lands for a fixed sum of money and an agreement to fence; after the plaintiff thus sold his right of way, he had no right to obstruct it by allowing his cattle to roam and browse upon it. This would be entirely incompatible with the right the law gives the company to a clear track, as held in *Skinner's case*, and would subject the public to the dangers and risks arising out of a relation between the company and an individual which might be disastrous to life and property. To avoid such results is the merit of *Skinner's case*. It was the duty of the plaintiff, therefore, to keep his cattle off the plaintiff's road at the risk of losing them; but the opposite of this is what he contends for, by claiming as the gravamen of his action that the cattle were killed on the road by reason of the neglect of the defendant to fence. This necessarily assumes the ground that having a contract to fence, care on his part to prevent his cattle trespassing on the road no longer existed. This the learned judge below properly denied, and in substance told the

¹ 51 Pa. 240 (1865).

jury that the wrong of the defendant in not fencing would neither authorize nor justify a wrong on part of the plaintiff, not only toward the defendant, but to the traveling public, by permitting obstruction in the road by his cattle and horses."

Acts Requiring Fences to be Built.

439. Unless provided by its charter a railroad company is not required to build fences along its line; but an act requiring it to do so is within the police power of the State, and constitutional. "Above and beyond any question between the landlord and the railroad company as to their respective rights and obligations, is that of the public safety. For that it is the duty of the legislature to provide; and for this purpose they are vested with all the legislative power of the commonwealth. By the escape of cattle through breaches occasioned by the burning of fences, the lives of thousands of human beings traveling on the railroad may be in constant peril. . . . It cannot, I think, be doubted that the legislature could compel the landholder under penalties, promptly to repair his fences even where the destruction is caused by the negligence of the railroad company or of others, leaving him to his legal remedy to recover his damages from those ultimately responsible. If so, they must have the same right to impose that duty upon the railroad company when the destruction has been caused by their act, even without fault or negligence on their part."¹

Where railroad companies are required by a special law to construct cattle-guards at all public road-crossings in a county, and are made liable for the value of any animal killed or injured through the absence of cattle-guards, a railroad company is liable for the value of a cow which

¹ Pennsylvania R. R. v. Riblet, 66 Pa. 164 (1870).

escapes from a field not abutting upon the railroad, strays out upon a public road to the track of the railroad where there are no guards, and is killed.¹

Under the Act of April 17, 1869, relating to fences and cattle-guards in McKean County, if it appeared that the cattle-guards were not effectual to keep the cattle off the track, evidence cannot be admitted to show that the cattle-guards in use were in the judgment of experienced railroad men, proper and sufficient. In such a case evidence that similar cattle-guards in another township had proved effectual to keep cattle from the track was incompetent.²

The provisions of the Warren County Act of March 28, 1868, P. L. 514, that "all railroad companies, when railroads are completed, and on which they are now running trains in said county, shall, before the first day of September, 1868, construct and keep in repair a good and sufficient fence along their tracks," etc., which act was extended to McKean County by the supplement of April 17, 1869, P. L. 1125, is applicable to a railroad company whose road was constructed through the latter county prior to the date of said original act.³

¹ *Dunkirk & Allegheny Valley R. R. v. Mead*, 90 Pa. 454 (1879).

² *Pennsylvania R. R. v. Japes*, 20 W. N. C. 570 (1887).

³ *Shurley v. New York, Lake Erie & Western R. R.*, 121 Pa. 511 (1888).

CHAPTER XXXV.

NEGLIGENCE—DAMAGE BY FIRE FROM SPARKS.

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| 440. Sparks. | 446. Contributory Negligence of Owner. |
| 441. Negligence Must be Proved. | |
| 442. Spark-Arresters. | 447. Remote and Proximate Cause. |
| 443. Fire Communicated by Particular Engine. | 448. When Facts as to Proximate Cause are Disputed. |
| 444. Where the Engine Causing the Fire is Unknown. | 449. When Facts as to Proximate Causes are Undisputed. |
| 445. Duty of Railroad Company as to Overhead Bridges. | 450. Parties. |

Sparks.

440. A railroad company is liable in damages for fires caused by the negligent and careless emission of sparks from locomotives. In *Huyett v. Phila. & Read. R. R. Co.*, LOWRIE, J., said: "The company has paid for its right of way and for all the inconveniences which were likely to result from the construction and use of its road, but this does not cover all sorts of damage: 10 Mees. & W. 425; 15 Beav. 322; s. c. 19 L. & Eq. Rep. 295, and it cannot cover damages arising from a negligence, for the law never anticipates this in assessing damages, and it never allows people to purchase a general immunity for carelessness. If it did no railroad company could pay the price in advance. This company, therefore, must submit to have the question of carelessness tried in this case just as in others: 1 Vent. 295; 1 Lutw. 90; 2 Stra. 1264; 11 Qu. B. Rep. 347; 1 L. Raym. 264.

“They are bound to temper their care according to the circumstances of danger: 20 State Rep. 177, and exert more care when the property of others is in danger than when it is not, and their evidence will be tried by this rule. And if there be evidence of carelessness the means of rebutting it are so entirely in the defendant’s power that it is not unreasonable to expect from them that their evidence shall be very complete.”¹

Negligence Must be Proved.

441. In an action against a railroad company to recover damages for injury to woods and fences caused by sparks from the company’s engines negligence in managing the fires of the engines must be proved; it cannot be inferred from the mere happening of the fire. In *Phila. & Reading R. R. Co. v. Yeiser*, ROGERS, J., said: “It is said that the proof of negligence in managing the fires of any particular engine, running as the engines of this company do, at all hours of the day and night, very many trains passing both ways, and with a speed that would defy or baffle observation, would always be a matter of extreme difficulty. The fire lodged in a wood or in a house might not break out into a conflagration for hours after, and twenty engines may have passed shortly before or after the fire was communicated, among which it would absolutely be beyond all proof to distinguish the one which caused the injury. From all this the learned judge draws the conclusion it would be unreasonable to require proof of negligence. It may be very true that there may be some difficulty in the proof, arising from the circumstances stated, and, if so, they ought to be

¹ 23 Pa. 373 (1854). See *Philadelphia & Reading R. R. v. Yeiser*, 8 Pa. 366 (1848). The risk of fire cannot be taken into consideration by viewers: *Lehigh Valley R. R. v. Lazarus*, 28 Pa. 203 (1857); *Sunbury & Erie R. R. Co. v. Hummell*, 27 Pa. 99 (1856).

taken into consideration by the jury. But because there is some perplexity in it arising from the manner in which the business of the road is done that is no reason that every principle of law should be uprooted by requiring no proof of negligence whatever. We see neither reason nor justice in the position. It would undoubtedly lead to great wrong to the company, who would have no means of guarding themselves against the malice or cupidity of the owner or others, who may fire the lands for the very purpose of making the company answerable in damages. If the law be that the existence of fire alone is all that is required to fix the liability of the company it would be difficult, if not impossible, for them to escape. They would in effect become insurers of every property, including the city of Reading itself, contiguous to the road, a grievance which might prove destructive to the interests of the company. It is therefore but just that they should have the benefit of the principles extended to all others, that no person is answerable in damages for the reasonable exercise of a right accompanied with a cautious regard to the right of others. The plaintiff in this suit declares for negligence. Negligence, according to his own showing, is the gist of the action, and yet he has been allowed to recover damages without any proof of negligence or any attempt even to prove it.”¹

Whether a barn or a house standing near to the track of a railroad was set on fire by sparks thrown from a locomotive is a question of fact, depending on the circumstances, when no direct proof is made, and therefore must be decided by a jury. Hence all the circumstances tending to the proof of the fact must be admitted in evidence.²

¹ 8 Pa. 366 (1848); *Hasbrouck v. New York, Lake Erie & Western R. R.*, 1 C. P. R. 156 (1880).

² *Philadelphia & Reading R. R. v. Hendrickson*, 80 Pa. 182 (1876).

Spark-Arresters.

442. A railroad company is negligent if it does not use spark-arresters on its locomotives.

In *Lackawanna & Bloomsburg R. R. Co. v. Doak*,¹ READ, J., said: "The only error assigned is that the court erred in not holding as matter of law that there was no negligence on the part of defendants, and that there could be no recovery by the plaintiffs; or in other words, that the court should have instructed the jury to find for the defendants. Such an instruction would have taken away all the facts from the jury, and have made the court decide both the law and the facts.

"Railroad companies are authorized by law to use locomotives propelled by steam generated by burning wood, coal, whether anthracite or bituminous, or any other ordinary fuel. The use, therefore, of fire with its necessary concomitants, is legal, and the limit imposed upon its use is, that the latest improvements in its management in practical use should be applied to it.

"In using locomotives to draw the cars, sparks will be emitted from the engine, which in a wood-burning engine will be arrested by a screen or spark-catcher of fine wire, and this, if in proper order, will to a very great extent, prevent all danger. An anthracite coal burner will not admit of a screen or spark-catcher of wire, but will of screen or spark-catcher of tank iron with apertures of three-eighths of an inch, such as are used on the Philadelphia & Reading Railroad, the greatest coal road of the country, and on the Delaware & Belvidere Railroad. On the Reading road coal-burning engines are used both for coal and freight and passengers. About one hundred and twenty engines burning coal pass in and out of Reading daily, and an average of about seventy engines burning coal pass in and out of the depot at Broad and Callowhill

¹52 Pa. 379 (1886).

Streets daily, and no accidents by sparks from their locomotives have happened in the present year in the cities of Reading and Philadelphia.

"I understand no screens are used on the coal burners on the Delaware, Lackawanna & Western Railroad, on account of its very heavy grades requiring the utmost draft and the road passing through a wild and sparsely settled region. No such reason applied to the Lackawanna & Bloomsburg Railroad, which follows the course of the Susquehanna.

"In the present case the engine was a coal burner without any screen, and therefore, in the primitive state which probably was the case when the anthracite coal was first used as the fuel to generate steam. It is clear then that the coal burner was without the improvements introduced long ago on the Reading Railroad; it would seem therefore, on this ground alone, the court could not have given the instruction prayed for.

"Whether in this instance, said Judge LOWRIE, 'it was caused by the carelessness of the defendant's servants, must be judged from the circumstances, and we think that the case referred to by the plaintiffs' counsel show clearly enough that this question, under the evidence here, is within the province of the jury:' *Huyett v. Philadelphia & Reading R. R. Co.*, 22 Pa. 374.

"In *McCully v. Clarke & Thaw*, 40 Pa. 408, Judge STRONG said: 'It is the province of the jury to balance the probabilities and determine where the preponderance lies. Using a dangerous agent the law requires of them to adopt such precautions as might reasonably prevent damage to the property of others. Some precaution was a duty. They had no right to run their locomotive without it. Failure to adopt some precaution was, therefore, failure to discharge a defined duty, and was negligence.'

"Similar doctrine is laid down in the notes of Mr. Wharton to *Vaughan v. Taff Vale R. R. Co.*, 3 H. & N. 743, and it is in consonance with the decision in that case, and on writ of error in the Exch. Ch., 5 H. & N. 679; *Fremantle v. London & Northwestern R. R. Co.*, 10 C. B. N. S. 89 (100 E. C. L. R.); and *Fero v. Buffalo & State Line Railroad Co.*, 22 N. Y. 209.

"The question of negligence is for the jury and not for the court, and they were right in refusing the instruction complained of."

If a railroad company uses ordinary skill in procuring a good and safe spark-catcher such as are most in use in the country and approved by experienced railroad operators and mechanics, it will be relieved from liability for loss occasioned by the emission of sparks from its locomotives.¹

Where the uncontradicted evidence shows that the spark-arrester was in perfect mechanical construction, and in efficient condition at the time of the fire, and there is no evidence that the company was otherwise negligent, the owner of buildings burnt by sparks from a locomotive cannot recover damages.²

The fact that an engine emits a stream of fire and sows the coals broadcast along its way, setting fire to many things along the track, is evidence from which the jury may infer an imperfect and inferior spark-catcher and from this fact negligence.³

Fire Communicated by Particular Engine.

443. In an action against a railroad company for the burning of a house where it is alleged that the fire was

¹ *Frankford & Bristol Turnpike Co. v. Philadelphia & Trenton R. R. Co.*, 54 Pa. 345 (1867); *Philadelphia & Reading R. R. v. Hendrickson*, 80 Pa. 182 (1876).

² *Philadelphia & Reading R. R. v. Yerger*, 73 Pa. 121 (1873).

³ *Pennsylvania Company v. Watson*, 32 P. F. Smith, 293 (1875).

communicated by a particular engine, the number of which is stated, the inquiry is limited to the condition of that engine, and its management; and evidence that other engines were defective, or that the particular engine in question had broken grates three years before the accident, is immaterial. If the engine was properly constructed as to its furnace and smoke-stack, and was furnished with a spark-arresting grate of the proper character, the company was not liable, although the building was burned by a fire accidentally issuing from the engine.¹

Plaintiff brought an action to recover damages for the destruction of his mill by fire alleged to have been caused by sparks from a locomotive. The mill was situate between the Pennsylvania and the Philadelphia & Reading railroads; the former passing in front, and the latter in the rear of the mill. The plaintiffs alleged that the fire, which occurred on the 10th day of August, 1888, was communicated from the sparks emitted by the engines of the Philadelphia & Reading Railroad. The fire was discovered about 6 or 6.15 o'clock P. M., in the upper part of a ventilator, on the side next to the defendant's road. The ventilator was about thirty feet high, and was within twenty-two feet of defendant's road. The watchman testified that he came on duty that evening about fifteen minutes before shutting-down time, and that the mill shut down at about 5.30 P. M., mill time, or 5.15 railroad time; that after he came on duty, and before the fire, two trains passed; the first a coal train, going north, drawn by an engine which he could not identify; and, about fifteen minutes later, a freight train, drawn by engine No. 72. The defendant's evidence, however, showed that two other engines, drawing passenger trains, passed

¹ Erie Railway Co. v. Decker, 78 Pa. 203 (1875).

this point, one at 5.21 and the other at 5.22 P. M., neither of which engines was identified; indeed, it would seem that the plaintiffs did not know they had passed there until the fact was developed in the defendant's testimony. The watchman testified, further, that it was his duty to take notice of the engines as they passed, to see whether they threw fire from the stacks; that he did watch the engine in front of the coal train, and also engine No. 72, and that he saw no sparks; but that as it was only six o'clock, and the sun was shining brightly, there may have been sparks emitted which he did not see. The only engine known, and identified was No. 72. The court admitted an offer to show the repeated emission of sparks of usual size by defendant's engines, during a period of six months preceding the fire, and also a similar offer unlimited as to time, under which testimony was received covering periods of two, three, and six months, and other testimony not indicating the time to which it referred. It was held that this testimony was irrelevant. CLARK, J., said: "Where the offending engine is not clearly or satisfactorily identified, it is competent for the plaintiff to prove that the defendant's locomotives generally, or many of them, at or about the time of the occurrence, threw sparks of unusual size and kindled numerous fires upon that part of their road, to sustain or strengthen the inference that the fire originated from the cause alleged. And as, in the case at bar, it is not definitely ascertained to which of the four engines this fire was attributable, three of them being unknown and unidentified, we cannot see how testimony of this character could be excluded. But the objective point of the inquiry is the condition of passing engines at the time of the occurrence. It is a matter of little consequence what might have been their condition ten years or two years before that; for the

precautions against fire, and the management of the engines may have been greatly changed within that period. It does not follow because the company, in its official management, may have been negligent in this respect at a time so remote, that it still remains so. The habits of individuals may, in some sense, be spoken of as fixed habits; but the official control and management of the affairs of a railroad company, as well as the various devices used as precautions against danger, are liable to frequent and radical changes. The line must be drawn somewhere. This class of testimony is exceptional in character at the best, and is only admissible because the ordinary sources of proof are inaccessible, and direct evidence impracticable. The rule should not, therefore, be carried beyond the necessity which justifies its admission. If at or about the time when fires are alleged to have been set by locomotive engines, unknown by number or other means of identification, the company is shown to have been habitually negligent in the equipment or management of its engines, or of many of them, this is a circumstance to be considered in connection with others, not only in determining the origin of the fire, but in deciding whether or not the company was, at the time, in this as in many other instances, negligent in failing to provide suitable precautions against danger. If many of the company's engines, at or about the time, are without sufficient spark-arresters, and frequent fires are kindled in consequence, it may well be inferred, in view of the effectual character of mechanical inventions of this kind, not only that the fire in question originated from this cause, but that it occurred from the habitual negligence of the company in failing to provide sufficient spark-arresters.

“In the case at bar, the first offer received, and which is

the ground of the first specification of error, was as follows: 'Plaintiffs offer to prove that the property of persons along the line of defendant's road, which passed the property of the plaintiffs destroyed by the fire in question on August 10, 1888, and within twelve miles of plaintiffs' said property, was repeatedly set on fire by unknown and unidentified engines of the defendant, and that the sparks causing said fires, emitted by the said engines, exceeded a hickory nut in size: to be accompanied by evidence of experts showing that the engine throwing sparks of the size of hickory nuts either did not use the most approved spark-arresters in general use, or, if they did, the spark-arresters used were permitted to become defective and out of repair, or were negligently managed by those in charge of them.' This offer, it will be seen, was wholly without limit as to time. The testimony received under it was, in some instances, confined to two or three months, in some to six months, and in some the testimony was general, and in such form as not to indicate to what period of time it referred. The second offer was: 'To prove that many of the locomotive engines of the defendant, which they cannot identify and which passed the plaintiffs' mill frequently during a period of six months preceding the fire, habitually threw sparks of the size of a hickory nut or larger,' etc. We are of opinion that the admission of these offers was error. The examination should be confined to the negligent operation of the engines of the company at or about the time of the fire, with such reasonable latitude, before and after the occurrence as is sufficient to enable such proofs to be practicable."¹

If there is no evidence that the locomotive from which the plaintiff's fences, hay, and grass caught fire was im-

¹ *Henderson v. Philadelphia & Reading R. R.*, 144 Pa. 461 (1891).

properly constructed and had not an approved spark-arrester, the case should not be submitted to the jury. Evidence that sparks were emitted from other locomotives is insufficient. "To hold that the fact of the fire having taken place, was *prima facie* evidence that the spark-arrester was defective, and, therefore, that the case ought to have been submitted to the jury, would be practically to hold railroad companies liable for all fires; for it is notorious that no spark-arrester has yet been invented to prevent all sparks, and a little spark may kindle as large a conflagration as a larger one, it depending very much on the dryness or humidity of the atmosphere, whether a spark will go out before reaching the ground, and whether what it reaches is in a condition to easily ignite."¹

But if, after the railroad company has given evidence that the locomotive was furnished with an approved spark-arrester, plaintiff shows that numerous fires had been ignited by sparks from the same engine, the case should be submitted to the jury.²

Evidence is inadmissible to the effect that sparks of unusual size had been emitted for some time prior to the fire and on other days by defendant's engines generally, where the fire was attributed entirely to the escape of sparks at a particular time from one of two particular engines.³

If there is evidence that the engine which caused the fire threw out sparks or balls of fire of the size of a hen's egg, a verdict in favor of the plaintiff will be sustained.⁴

¹ *Jennings v. Pennsylvania R. R.*, 93 Pa. 337 (1879); *Philadelphia & Reading R. R. v. Schultz*, 93 Pa. 341 (1880); *Reading & Columbia R. R. v. Latshaw*, 93 Pa. 449 (1880).

² *Philadelphia & Reading R. R. v. Schultz*, 93 Pa. 341 (1880).

³ *Albert v. Northern Central Ry.*, 98 Pa. 316 (1881).

⁴ *Philadelphia & Reading R. R. v. Kerst*, 2 Walker, 480 (1884).

Where the Engine Causing the Fire is Unknown.

444. Where it appears that the fire began near the railroad track, but it did not appear what particular engine dropped the coals, a witness living several miles from the barn which was burned may testify that it was a common occurrence for engines near where he lived to throw sparks and set fire rods away from the railroad track. "This was not a case where a certain engine had thrown out the sparks which set fire to the plaintiff's barn, but it was where the engine was unknown, yet the cause of the fire was clearly traced to the railroad track, and left the belief that some one of the engines of the defendants had emitted the coals which set the barn on fire. It, therefore, became necessary to establish the fact by such proofs as rendered the belief a certain fact. This could be done, not by the proof that a certain engine emitted sparks incessantly, for *non constat* that this particular engine had passed the plaintiff's premises on that day. Hence it was necessary to permit the party to show that the emitting of coals and sparks in unusual quantities was frequent and permitted to be done by a number of engines. The range of the evidence in this respect of necessity carried it to a greater range as to locality also. We cannot say that the court below committed any error in the admission of the evidence assigned for error."¹

The mere fact that after the passage of a train dry grass and other combustible material were found burning along the line of a railroad is not of itself evidence of negligence on the part of the railroad company.²

Evidence that on some occasions sparks larger than common issued from engines on the road, but not from the particular engine which caused the fire, is insufficient

¹ Pennsylvania R. R. v. Stranahan, 79 Pa. 405 (1875).

² Reading & Columbia R. R. v. Latshaw, 93 Pa. 449 (1880).

to send the case to the jury. The mere fact that the fire occurred is not *prima facie* evidence that the spark-arrester of the engine was defective.¹

Duty of Railroad Company as to Overhead Bridges.

445. A railroad company is not required to shut off steam from its locomotives in passing in close proximity to bridges. In a case where a bridge was burnt from sparks emitted by a locomotive which was supplied with a spark-catcher, AGNEW, J., said: "Schenk's Station is between three and four hundred yards distant from the railroad bridge, over the Neshaminy Creek, and the railroad bridge was distant from plaintiff's bridge one hundred and fifty feet at the Bristol end, and three hundred feet at the Philadelphia end. It is necessary after stopping at Schenk's Station to let on steam to start the train and carry it beyond the bridge. The plaintiff's position is that their bridge should not have been passed under steam, and that the station should not have been placed so near. But this is inconsistent with the clearly-granted rights of this company to locate the route and fix the stations to suit the public convenience. In the absence of a special motive to do injury, we must presume the location was made for proper ends, and not to do mischief. To hold, therefore, that it is improper to stop at this station, and that steam must be shut off in passing over the Neshaminy, is to abridge the proper and ordinary use of the road. The injury in this case did not arise from any special act of negligence, but from the customary and lawful use of the road. The cases referred to as authorities on this point are instances of departures from the customary use of the track. That use will not justify

¹ Jennings v. Pennsylvania R. R., 9 W. N. C. 150 (1879).

stopping to blow off steam through the mud valves at a common crossing, where many horses pass, and are frightened by the noise; or stopping in a high wind opposite a new house in the process of building, where the burning cinders and sparks are carried through the open doors by the wind. In these cases the engineer might have found other and better places to stop, and his act was not an ordinary use of the track. Negligence has been defined to be the absence of care according to the circumstances; but it certainly never has been held that the steam must be shut off in passing even in close proximity to dwellings, though many lines of railroad run within a few feet of valuable houses, mills, and manufactories, through towns and cities. I know no greater protection to which a bridge is entitled than a dwelling filled with inmates."¹

Contributory Negligence of Owner.

446. It is not contributory negligence on the part of the owner of a barn standing near a railroad to suffer the roof to be in such a condition as to render it more liable to take fire than if it were a secure and safe roof. If such a duty were imposed upon the owner it would deprive him of the enjoyment of his property in the way most suited to himself. He could not put his hay into stacks or ricks, or suffer straw to lie around his barn for his cattle to feed or rest upon, and he would be compelled to keep his houses, stables, and barns under the best known safe roofs or insure them against the negligence of the railroad company.²

It is not contributory negligence in the owner to

¹ Frankford & Bristol Turnpike Co. v. Philadelphia & Trenton R. R. Co., 54 Pa. 345 (1867).

² Philadelphia & Reading R. R. v. Hendrickson, 80 Pa. 182 (1876).

leave combustible material on his land near a railroad track.¹

But if a person piles lumber in a very dry season near to a railroad track he is guilty of such contributory negligence as will prevent him from recovering damages for the loss of the lumber caused by sparks emitted from the railroad company's engine.²

Remote and Proximate Cause.

447. In determining whether the negligence of a railroad company is the remote or proximate cause of the destruction of property the jury must determine whether the original cause—that is, the negligence—is, by continuous operation, so linked to each successive fact as that all may be said to be one continuous operating succession of events, in which the first becomes naturally linked to the last, and to be its cause, and thus to be within the probable foresight of him whose negligence ran through the succession to the injury.

After a train had passed plaintiff's property fire was immediately discovered in one of the cross-ties of the track, which was communicated directly to the grass that had been cut and pulled and thrown into a pile, in the fall before, was carried thence by means of rubbish and dry grass on the company's ground across the roadway to the fence, which was fired, and thence across two grass fields, burning the dry grass in its pathway, until it reached the plaintiff's fence and woodland, about six hundred feet from the railroad, burning the fence and a large part of the woods. The weather was dry and windy, and the direction of the wind was strongly toward

¹ Lehigh Valley R. R. v. McKeen, 90 Pa. 122 (1879); Philadelphia & Reading R. R. v. Schultz, 93 Pa. 341 (1880).

² Post v. Buffalo, Pittsburgh & Western R. R., 103 Pa. 585 (1885).

the plaintiff's fields and woods. It was contended that the defendants were not liable for the injury to the plaintiff's fence and woods, on the ground that the injury was too remote from the original cause. It was held that the case was for the jury to determine whether the destruction of the fence and woods was caused by the negligence of the railroad company.¹

Where Facts as to Proximate Cause are Disputed.

448. If the facts are disputed the question of remote and proximate cause are for the jury.

A railroad company permitted a car used for carrying tar to stand on a track opposite to and near plaintiff's oil tank. The car caught fire from the sparks of an engine, and the fire was communicated to the oil tank, which was thirty-six feet distant. It was held that the question of negligence, and of proximate and remote cause were questions for the jury.²

A railroad company, by sparks negligently emitted from a locomotive, set on fire a rotten stump standing on its right of way, near to the site of lumbering operations carried on by the plaintiff. The plaintiff's agents twice attempted to extinguish the fire in the stump, and each time thought they had succeeded. About nineteen hours afterward, a wind arose and fanned the smouldering fire to a flame and caused it to spread and destroy the plaintiff's lumber. It was held that the case was for the jury.

¹ *Pennsylvania R. R. v. Hope*, 80 Pa. 373 (1876).

A test by which the line is to be drawn between proximate and remote cause, in reference to liability for the consequence of negligence, is the consideration whether the chain of events was so linked together, as a natural whole, that the final result was the natural and probable consequence of the wrong-doer's negligent act. *Harvey v. State Line & Sullivan R. R.*, 135 Pa. 50 (1890).

Hoag v. Railroad, 85 Pa. 293 (1877) and *Kerr v. Railroad*, 62 Pa. 353 (1869), would probably now be sent to a jury.

² *Confer v. New York, Lake Erie & Western R. R.*, 146 Pa. 31 (1892).

The court said : "The pauses in the progress of the fire, and the lapse of time, while matters for the consideration of the jury in determining the continuity of effect, do not of themselves make such a change as requires the court to say that they break the connection. The ordinary danger of wind helping a fire to spread is one of the things to be naturally anticipated. The lapse of time before the wind arose, in this case, was therefore not clearly a new cause to be so pronounced by the court, but a circumstance to be considered, with the others, by the jury."¹

Sparks were thrown from an engine to a point alongside of the defendant's track, on land adjoining plaintiff's about three hundred feet from a lumber pile, and set fire to combustible materials, consisting of leaves, briars, brush, stumps, and logs, burning the same in its pathway until it reached the plaintiff's lumber. The weather was dry, and a high wind was blowing in the direction of the property destroyed. There was evidence that the sparks emitted from the engine were of unusual size. The defendant, however, produced evidence which tended to show that the engine was supplied with the most approved spark-arrester. The case was properly left to the jury to determine whether the negligence of the railroad company was the proximate or remote cause of the injury.²

A storehouse used for the storage of coal and straw was situated about ninety feet from defendants' railroad. Some straw scattered about the building caught fire from sparks thrown out by a passing locomotive, and the fire thus ignited was carried by a high wind to the storehouse, which was destroyed. Shortly before the discovery of the fire, a locomotive had passed, which was observed by

¹ *Haverly v. State Line & Sullivan R. R.*, 135 Pa. 50 (1890).

² *Lehigh Valley R. R. v. McKeen*, 90 Pa. 122 (1879).

several witnesses to be throwing out unusually large cinders. It was held that the case was properly left to the jury to determine whether the negligence of the railroad company was the remote or proximate cause of the injury. The court said: "This case is ruled by the *Pennsylvania R. R. Co. v. Hope*, 80 Pa. 373. It is a much stronger case than that, for the application of the rule there laid down. The building burned was a storehouse, and the straw fired was a natural incident of the business carried on in the building, and the communication of fire therefore direct to the building without any intermediate cause."¹

Where Facts as to Proximate Cause are Undisputed.

449. If the facts are undisputed the court may pass on the question as a matter of law.

Plaintiffs were the occupiers of a piece of land situated within the limits of Oil City, on the western bank of Oil Creek. The railroad of defendants is constructed along said creek, over the land of the plaintiffs and at the base of a high hill. On the afternoon of April 5, 1873, during a rain storm, there was a small slide of earth and rock from the hillside down to and upon the railroad. About ten minutes prior to the accident, one of the defendants' engines had passed over the road in safety. At that time no slide had occurred. This engine was followed in a few minutes by another engine drawing a train of cars loaded with crude oil in bulk. The latter engine ran into the slide, was thrown off the track, ran on about one hundred to one hundred and fifty feet, when the tender, which was in front of the engine, was overturned into Oil Creek; the engine itself was partly overturned; two or three oil cars became piled up on the track and

¹ *Pennsylvania & New York Canal & R. R. Co. v. Lacey*, 89 Pa. 458 (1879).

burst. The oil took fire, was carried down the creek, then swollen by the rain, for several hundred feet, set fire to the property of the plaintiffs and partly consumed it. It was held that the plaintiff was not entitled in law to recover.¹

A railroad company left oil cars on a siding or branch to be loaded with oil by an oil company superintendent. The superintendent having loaded one of the cars detached it from the others and allowed it to run down grade toward the main track. The car collided with a locomotive, and in the collision the oil was ignited, and in the fire which resulted plaintiff's house was burned. It was held that the destruction of the house was the natural and proximate consequence of the negligent conduct of the superintendent, who was for the purpose of loading the car the railroad company's agent.²

Parties.

450. A person who has cut logs under a contract with an owner of land has such an interest in the logs as entitles him to maintain an action for the loss of the logs caused by sparks negligently emitted from a locomotive belonging to a railroad company.³

Where lumber is burnt by sparks from a locomotive, suit cannot be brought for its value by the owner and the insurance company which had insured it against loss.⁴

¹ Hoag & Alger v. Lake Shore & Michigan Southern R. R., 85 Pa. 293 (1877).

² Oil Creek & Allegheny River Ry. v. Keighron, 74 Pa. 316 (1873).

³ Haverly v. State Line & Sullivan R. R., 125 Pa. 116 (1889).

⁴ Post v. Buffalo, Pittsburgh & Western R. R., 2 Walker, 464 (1885).

CHAPTER XXXVI.

NEGLIGENCE—STREET RAILWAYS.

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Injuries to Persons Using Streets—Relative Rights of Citizens and Street Railway Companies to Use of Streets.

451. The cars of a street railway company have a superior right of way to a citizen. It is the duty of a citizen, whether on foot or in vehicle, to give unobstructed passage to the cars. This results from two reasons; first, the fact that the car cannot turn out, or leave its track; and secondly, for the convenience and accommodation of the public. "These companies have been chartered for

the reason in part, at least, that they are a public accommodation. The convenience of an individual, who seeks to cross one of their tracks, must give way to the convenience of the public. It would be unreasonable that a carload of passengers should be delayed by the unnecessary obstruction of the track by a passing vehicle. On the other hand, it is the duty of the companies to see that their motor-men shall be on the alert, not only at street crossings, but everywhere upon the track to see that citizens are not run down and injured."¹

The substitution of cable and electric cars for the horse car and the omnibus is a change which renders impracticable and dangerous certain uses of the streets which were once permissible and comparatively safe. It introduces new conditions, the non-observance of which constitutes negligence. It is the duty of property-owners on streets occupied by cable and electric lines of railway, and of persons crossing or driving upon such streets, to recognize and conform to these conditions. The risk of a crossing or possession of the tracks of a railway operated by horse power is not to be compared with the peril involved in a crossing or occupancy of the tracks of a steam, cable, or electric railway. The conditions are

¹ *Ehrisman v. East Harrisburg City Passenger Ry.*, 150 Pa. 180 (1892); *Warner v. People's Street Ry.*, 141 Pa. 615 (1891).

"Street railway companies have not an exclusive right to the highways upon which they are permitted to run their cars, or even to the use of their own tracks. The public have a right to use these tracks in common with the railway companies, and therefore, while the rights of the latter are in some respects superior to those of the former, it is not negligence *per se* for a citizen to be anywhere upon such tracks. So long as the right of a common user of the tracks exists in the public, it is the duty of passenger railway companies to exercise such watchful care as will prevent accidents or injuries to persons who, without negligence upon their own part, may not at the moment be able to get out of the way of a passing car. The degree of care to be exercised must necessarily vary with the circumstances, and therefore no unbending rule can be laid down:" *Gilmore v. Federal Street & Pleasant Valley Pass. Ry.*, 153 Pa. 31 (1893).

notably unlike in the size, weight, and speed of the cars, and in the power by which they are moved.¹

In a case where a cable car ran over and killed a boy six years old, there was evidence at the time of the accident the gripman was standing on the side of his cab with one hand out of the window and looking toward the houses he was passing, and that he did not have hold of his grip or brake, and that when halloosed to by persons who saw the child on the track when the car was two and one-half lengths away, he paid no attention to the warning. It was held that the case was for the jury. The court said: "The running of this class of cars through the crowded streets of the city is necessarily attended with danger. In fact, it is difficult to have rapid transportation through a city without an element of danger. Very much depends upon the care of the gripman. He should always be on the alert, to avoid danger, and his attention never should be diverted from his duties. He should keep his eye constantly on the track before him. If he is permitted to gaze at houses or other objects while the car is in motion, and an accident occurs by reason of such conduct, the company employing him must expect to be held responsible; and it is suggested for the benefit of such corporations, as well as for the safety of the public, that under no circumstances should any one be allowed to ride in the cab with the gripman. Such a matter cannot fail to distract his attention from his duties and may be the cause of some serious accident."²

A person, whether on foot or on horseback, or in a carriage moving on a track of a street railway, must keep a lookout for a car entitled to pass in an opposite direction on the same railway, and to turn off the track soon

¹ *Winter v. Federal Street & Pleasant Valley Pass. Ry.*, 153 Pa. 26 (1893).

² *Schnur v. Citizens' Traction Co.*, 153 Pa. 29 (1893).

enough to allow the car to pass without impediment. If such a person fails to observe this precaution and is injured by a car, he is negligent, and cannot recover from the railway company.¹

If a driver of a vehicle upon the track of a street railway is not on his guard to get off the track when a car approaches, he is guilty of contributory negligence, and cannot recover damages for injury to his vehicle.²

Duty to Give Signals at Street Crossings.

452. It is the duty of the gripman of a traction car to ring his bell at all street crossings, and if in so doing horses are frightened the gripman is not chargeable with such negligence as will render the company liable.

Plaintiff was a butcher, residing in Montgomery County, and was in the habit of driving a two-horse wagon to the city of Philadelphia, loaded with meat, which he sold to his customers. On the day of the accident he was engaged on Columbia Avenue, delivering meat from his wagon, when his horses became restive at the approach of one of the cars of the defendant company. He then left the rear end of his wagon and went to his horses' heads to quiet them. The car approached, and when near the horses stopped, the gripman at the same time ringing his bell. The horses took fright, broke from plaintiff, and ran away, by means of which he was injured. It was held that plaintiff could not recover. The court said: "There is no analogy between this case and the use of a steam-whistle wantonly blown in a crowded place. The steam-whistle naturally tends to alarm horses; the traction bell does not. What was said of a steam road in *Phila. et. R. Co. v. Stinger*, 78 Pa. 219, is applicable here:

¹*Jatho v. Green & Coates St. Passenger Ry.*, 4 Phila. 24 (1860).

²*Quinby v. Chester Street Railway*, 2 Delaware County, 285 (1885).

‘We have held these corporations to a strict line of responsibility for the failure to give sufficient warning of the approach of their trains at road crossings. It would not be just to them, nor safe to the traveling public, for us now to criticise too closely the precise amount of noise employed in giving the needed warning at such places.’ We may supplement these remarks by saying that, in view of the crowded condition of the streets of the city of Philadelphia, the number of women and children and of aged and infirm persons who are constantly crossing the tracks of the traction company, not only at street intersections, but elsewhere, we would be loath to sanction a principle which would make a gripman hesitate every time his hand touched the bell-rope.”¹

The plaintiff hitched his horse to an awning post on the side of a street upon which cable cars were running. The horse became frightened, and ran upon the track, where it was struck by a passing car. The plaintiff described the accident as follows: “I had just taken the hitching-strap off, and a cable car came along ringing a bell, I thought, very loudly. My horse pulled the strap from my hand. There were some boxes in the way, and I could not get around to reach him, and the cable car struck him, and I ran down Market Street after my horse and wagon. The ringing of the bell started the horse. He had never started off before. I think the car could have been stopped before it touched the horse. When the horse reached the track the cable car was about eighteen to twenty feet off (witness indicating the distance from witness-stand to court-room wall, about eighteen or twenty feet). The gripman could have stopped the car and have seen the horse.” There was no other evidence as to defendant’s negligence. It was held that there was

¹ *Steiner v. Philadelphia Traction Co.*, 134 Pa. 199 (1890).

no evidence of negligence on the part of the company; that it was not negligence to ring the bell as the car was approaching a cross street, and that it would have been negligence not to have done so.¹

Speed.

453. The ordinary speed of a street car ought to be checked at every street crossing, especially after dark, and the driver should be looking before him, and never suffer his attention to be diverted.²

An electric railway company is guilty of negligence in running its cars at a high rate of speed at a point where the company had cut down the grade of the street from two feet and had piled the dirt from the excavation upon the street on either side of the track;³ or in running a car along a narrow and unlighted alley on a dark night at a rate of speed that will not permit its stoppage within the distance covered by its own head-light.⁴

A boy about five and one-half years old, while playing with his brother, ran into the front end or the side of a cable car and was injured. The point where the accident occurred was about twelve feet beyond a corner where the car had stopped. The evidence showed that the car started slow at first, and then at the speed of a cable up the grade, which was quite steep at this point. The court held that the boy was not entitled to recover damages for his injuries.⁵

A child of tender years was on a track behind a passenger car, and unable to perceive another car coming in the opposite direction. He was suddenly summoned by

¹ Philadelphia Traction Co. v. Bernheimer, 125 Pa. 615 (1889).

² West Phila. Pass. Ry. v. Mulhair, 6 W. N. C. 508 (1879).

³ Greeley v. Federal Street & Pleasant Valley Ry., 153 Pa. 218 (1893).

⁴ Gilmore v. Federal Street & Pleasant Valley Ry., 153 Pa. 31 (1893).

⁵ Chilton v. Central Traction Co., 152 Pa. 425 (1893).

the driver of a wagon following in the track of the first car to move on, and springing forward precipitately to avoid this danger was injured beneath the feet of the horses attached to the second car. It was held that the driver of the second car was negligent in driving rapidly past the rear of the car which concealed the boy.¹

Crossing Street-Car Tracks.

454. A traveler who is about to drive across a street railway is guilty of negligence if he does not look and listen at the edge of the track. There is no danger, as in the case of steam roads, of stopping a horse at the very edge of the track. It is the traveler's duty, therefore, when he reaches it before attempting to cross, to look in both directions for approaching cars. If there is an obstruction, it is his duty also to listen, and his neglect to do so is negligence *per se*. There can be no question for the jury as in the case of steam railroads, as to the place where it is the duty of the traveler to stop.²

Plaintiff driving a phaeton attempted to cross a street railway track in front of a horse car approaching at a trot upon a descending grade. Plaintiff testified that at the time she undertook to cross, the car was thirty feet or more distant from her, and she thought there was time to cross. The distance, however, was disputed, and plaintiff was prevented from seeing the car by the curtain of

¹ Warner v. R. R. Co., 6 Phila. 537 (1863).

² Ehrisman v. East Harrisburg City Passenger Ry., 150 Pa. 180 (1892); Wheelahan v. Philadelphia Traction Co., 150 Pa. 187 (1892).

"The street railway company has a right to the use of its tracks, subject to the right of the crossing by the public at street intersections; and one approaching such a place of crossing must take notice of it, and exercise a reasonable measure of care to avoid contact with a moving car. It may not be necessary to stop on approaching such a crossing, for the rate of speed of the most rapid of these surface cars is ordinarily from six to nine miles per hour; but it is necessary to look before driving upon the track." Carson v. Federal Street & Pleasant Valley Ry., 147 Pa. 219 (1892).

the phaeton. Just before she turned to cross, the driver of the car looked to one side, along a cross street, to see whether there were any passengers upon it desiring to board his car. There was no evidence that his attention was unnecessarily diverted or for any unreasonable time. As soon as he saw the plaintiff's carriage on the track, he applied the brake and swung his horse to one side of the track, but notwithstanding this, the car collided with the phaeton before the latter had passed over the rails. It also appeared that the driver was also conductor of the car. It was held that there was no sufficient evidence of negligence on the part of the driver to justify the submission of the case to the jury, and that even if there had been, the plaintiff was guilty of contributory negligence which would prevent her recovery.¹

If a person approaches a street railway track in a hooded wagon, and neglects to lean forward in his wagon so as to obtain an unobstructed view of the track, he is guilty of contributory negligence, and cannot recover for injuries sustained by collision of the street car.²

If a person drives along a street-car track, and after looking to see whether a car is coming, drives a further distance of sixty feet along the track before crossing, and does not look again he is guilty of contributory negligence, and cannot recover for damages sustained by collision with the street car.³

A carriage while being driven across the track of a passenger railway was struck by the pole of a car and damaged. Defendant requested the court to charge that if plaintiff saw the car coming on a down grade within about the width of the street from his course, and never-

¹ *Thomas v. Citizens' Passenger Ry.*, 132 Pa. 504 (1890).

² *Wheeler v. Philadelphia Traction Co.*, 150 Pa. 187 (1892).

³ *Ehrisman v. East Harrisburg City Passenger Ry.*, 150 Pa. 180 (1892).

theless crossed on a walk in front of it, he was guilty of contributory negligence. The evidence as to the speed of the car being conflicting, the court refused the point, and left the whole case to the jury. It was held that there was no error.¹

A street-car driver who sees a person crossing the tracks ahead of him has no right to run him down, if the car can be stopped in time to avoid a collision.²

Dangerous Situation.

455. A person who voluntarily places himself in a dangerous situation is guilty of contributory negligence. Plaintiff was at work alongside of street railroad tracks at a point where the street was obstructed by building materials and where a car could not pass him without collision. On the opposite side of the track was another obstruction, so that when a car approached the workmen would signal it to stop until they could get out of the way. Plaintiff signaled a car to stop, but his signal was disregarded, and he was compelled to run ahead of the car, but was struck and injured before he could get out of the way. Plaintiff had been working at the place where the accident occurred for two weeks. The court held that as the plaintiff had voluntarily placed himself in a place of known and unusual danger he could not recover.³

Plaintiff, while walking within the tracks of a street railway, came to a point where the track ran through a snow drift for a distance estimated at half a block. The snow had been removed from the track at this point, leaving a passage just wide enough for the cars, with vertical walls of snow two or two and a half feet in height. Plain-

¹ *Girard College Pass. Ry. v. Middleton*, 3 W. N. C. 486 (1877).

² *Thomas v. Citizens' Pass Ry.*, 5 Montgomery County Rep. 84 (1889).

³ *Ferguson v. Philadelphia Traction Co.*, 9 Pa. C. C. R. 147 (1890).

tiff testified that she looked just before she went into the cut to see if there was a car behind her and saw none; but the evidence to the contrary was overwhelmingly against her. The situation of the cut showed that if plaintiff had looked at all as she was about to enter the cut she would have plainly seen the car. Near the mouth of the cut was a switch, and as the car entered the cut the driver was watching for a broken rail at the switch and did not see plaintiff until the horses reached her. It was held that the plaintiff was not entitled to recover.¹

A driver left a horse and wagon unguarded upon the track of an electric street railway in a narrow and unlighted alley on a dark night. A car ran into the horses and injured them. It was held that plaintiff could not recover.²

A driver of a wagon in delivering a safe on a dark night unnecessarily placed his horses squarely across the track of an electric railway at a point where there was a descending grade. It was held that he was guilty of contributory negligence.³

Defective Rail.

456. Plaintiff was injured by collision with a street car while driving in a low road-cart on one track of defendant's railway. Observing a car coming toward him, he turned to draw in ahead of a car on the other track going in the same direction with himself. As he did so the wheel of his cart caught in an upturned rail which had become loose at the end toward which he was driving, and stood up from two to four feet, with its point turned toward him. Plaintiff was thrown in front of the car

¹ Warner v. People's Street Ry., 141 Pa. 615 (1891).

² Gilmore v. Federal Street & Pleasant Valley Pass. Ry., 153 Pa. 31 (1893).

³ Winter v. Federal Street & Pleasant Valley Pass. Ry., 153 Pa. 26 (1893).

and injured. It appeared that plaintiff was seated in the centre of the cart and did not see the rail. There was evidence that the street on both sides of the track was full of holes; also that the rail had been loose the day before, but had been nailed down, and that it was loose on the morning of the day the accident occurred. It was held that the whole case was for the jury.¹

Miscalculation of Distance.

457. Plaintiff, who was a driver of a dray, testified that he was driving upon the track of defendant company, and when he arrived nearly opposite the store at which he was to stop, another dray delayed him, and seeing a car approaching, he turned off to the other side of the track. He then got off his dray and while in the act of blanketing his horse, a car passed and struck the hub of his wheel, which caused the shaft of the dray to knock him down and throw him under the wheel of the car. The evidence seemed to show that the driver of the dray was mistaken in thinking that he had stopped at a perfectly safe distance from the track. The car driver seemed also to have been of the same opinion as the plaintiff. It was held that under the circumstances of a miscalculation on the part of both plaintiff and the driver of the car, it was not error to enter a non-suit.²

Proximate Cause.

458. A street car being off the track, a movement was made to restore it to the track in the ordinary manner. A horse attached to a carriage standing about twenty feet from the car, suddenly reared up and fell over dead. It was held that there was no testimony established the rela-

¹ *Bradwell v. Pittsburgh & West End Pass. Ry.*, 153 Pa. 105 (1893).

² *Patton v. Philadelphia Traction Company*, 132 Pa. 76 (1890).

tion of cause and effect between the acts of the defendant company and the death of the plaintiff's horse, in a sense which the defendant could be held responsible for the death of the horse.¹

Piling Rails in Gutter.

459. It is negligence for a street car company to take up old rails from their track, and pile them in the gutter on the street and leave them there for several weeks.²

Negligence of Driver of Wagon Imputed to Owner.

460. The owner of a wagon which is injured by collision of a street car is affected by the contributory negligence of his driver.³

Injuries to Passengers—Presumption of Negligence.

461. The happening of an accident to a passenger, if the accident is connected with the means of transportation raises a presumption of negligence on the part of the company. A woman, five months in pregnancy, boarded a street car as a passenger. The car in rounding a sharp curve, jumped the track and plaintiff was thrown from her seat upon her hands and knees. As a result of the fall, she stated that she had a miscarriage. The court charged the jury that the fact that the car ran off the track raised a presumption of negligence, and that the company was bound to show absence of the slightest negligence, and that the accident could not have been prevented by the exercise of the highest degree of care. It was held on appeal that the instruction was correct.⁴

¹ *Hazel v. People's Passenger Ry.*, 132 Pa. 96 (1890).

² *Southside Passenger Ry. v. Cox*, 2 Mona. 140 (1889).

³ *Carson v. Federal Street & Pleasant Valley Ry.*, 147 Pa. 219 (1892).

⁴ *Reading City Passenger Ry. v. Eckert* 4 Atl. Rep. 530 (1886).

The fact that the driver of a street car was asleep at the time an accident occurred, raises a presumption of negligence, but it cannot be presumed that he was asleep from the fact that he was required to work an excessive length of time without rest. This would lead to a presumption upon a presumption, which is never allowed.¹

Plaintiff, an elderly woman, was injured in a street car. Her testimony, which was contradicted, tended to show that she entered the car from the front platform at the invitation of the driver, and, before she was able to take her seat, the car was started with a jerk, and she was thrown down and injured. It was held that there was sufficient evidence to submit the case to the jury.²

A woman was unable to obtain a strap in a crowded street car. The horses were balky, and came to a stop near a railroad track. The conductor of the car being unable to start the car without assistance, asked the aid of a driver of a team of eight mules. The team started the car with a sudden jerk, which threw the woman backward injuring her spine. It was held that the case was properly left to the jury.³

When a passenger in a street car is injured by a collision with a locomotive at a railroad crossing, a presumption of negligence arises against the street car company.⁴

Getting on Car.

462. It is not contributory negligence for a person to attempt to board a street car by the front platform when the car is moving so slowly that a person of reasonable

¹ Philadelphia City Pass. Ry. v. Henrice, 92 Pa. 431 (1880).

² Holmes v. Allegheny Traction Co., 153 Pa. 152 (1893).

³ Continental Pass. Ry. v. Swain, 13 W. N. C. 41 (1883).

⁴ People's Pass. Ry. v. Weiller, 17 W. N. C. 306 (1886).

prudence, in the exercise of ordinary care, would not hesitate to make the effort.¹

A passenger who attempts to board a street car when in motion, and the conductor inside, must be held to a reasonable degree of care.²

Plaintiff was injured while attempting to get on a street car. He described the occurrence as follows: "I was standing at the lookout corner, and I signaled the driver to stop. He stopped the car; by the time it came to me it had a little speed, but was moving so little that it would not be noticed. I was facing the left-hand side of the car coming down, placed my left hand on the hand-rail and my right foot on the step, when I heard the break go off, and before I had firm footing the car moved, pulled me along and broke my arm; I was dragged a short distance." It was held that the plaintiff was properly non-suited.³

Plaintiff, while attempting to get on a street car still in motion, had his arm encumbered with his coat and dinner bucket when he placed his foot on the step. The motion of the car caused his foot to slip. Having only his right hand free, he was unable to hold on, and fell off and was injured. The only alleged negligence on the part of the driver was in loosening the brake when the plaintiff stepped on the car. It was held that the plaintiff was not entitled to recover damages.⁴

Plaintiff's son, who was over age, was killed by a dummy engine of a street passenger railway. One of the plaintiff's witnesses testified that the deceased left the brickyard, where he was working, for the purpose of getting on the dummy, and that he had cautioned him against doing

¹ *Stager v. Ridge Ave. Pass. Ry.*, 119 Pa. 70 (1888).

² *Picard v. Ridge Avenue Passenger Railway*, 147 Pa. 195 (1892).

³ *Picard v. Ridge Avenue Passenger Railway*, 147 Pa. 195 (1892).

⁴ *Reddington v. Philadelphia Traction Company*, 132 Pa. 154 (1890).

so because he had been drinking. The driver and conductor both swore that they did not know deceased, and knew nothing of the accident until the day following its occurrence. None of the passengers were called as witnesses. The court entered a compulsory non-suit.¹

A child between seven and eight years of age attempted to get upon the front platform of a street car when the car had stopped to allow a passenger to alight. The boy did not signal the conductor or driver, or in any way announce his intention to become a passenger. The car was started in the ordinary manner, and the boy was thrown under the wheel and injured. It was held that he could not recover. GREEN, J., said: "Assuredly the company was entitled to some kind of notice of his intent to assume the relation of passenger before being charged with the duty of taking care of him as a passenger. So far as the suggestion is concerned that the driver ought to have seen him, it is enough to say that the duty of the driver was to attend to and look after his horses. He had to get them started, and he was subject to a strict legal duty to see that there were no persons on the track in front of him, and he was certainly not guilty of negligence in rigidly attending to that duty. It was the plain duty of the boy to give some notice of his intent to become a passenger, and until he did so the defendant was not guilty of any negligence in simply not knowing of such intent."²

Plaintiff, a woman, was about to enter a street car, and when she was upon the rear platform the driver suddenly whipped up his horses to avoid a collision with a runaway horse and carriage. The sudden jolt of the car threw the plaintiff to the ground, when she was imme-

¹ Dougherty v. Frankford & Southwark Pass. Ry., 5 W. N. C. 14 (1878).

² Pitcher v. People's Street Ry., 154 Pa. 560 (1893).

diately struck by the runaway horse and injured. It was held that, even if the driver had been guilty of negligence, such negligence was not the proximate cause of the injury, and the jury should have been instructed that plaintiff was not entitled to recover.¹

The fact that a conductor was inside of a street car when the car had slowed up at a crossing to permit a passenger to get on is not evidence of negligence on the part of the company.²

It is not necessary that a street car should come to a dead stop until a passenger who gets on is seated.³

Where a passenger is injured before he has actually placed himself in the carrier's hands, the mere fact of the injury raises no presumption of negligence on the part of the railroad company.

Plaintiff attempted to board a street car at the front platform whilst the car was in motion. He succeeded in getting on the lower step with one foot only, and, before he could establish himself there, a sudden motion of the car forward threw him off and he fell under the wheels. It was not definitely known at what rate the car was moving at the time of the occurrence. Plaintiff had given the conductor a signal to stop, and as the car approached the crossing it "slowed up," but before it had fully arrived at the place where the stop was to be made, and whilst it was still in motion, he attempted to enter by the front platform, with the result stated. The evidence seemed to show that the car was moving quite slowly, but did not stop. There was no evidence whatever to show what caused the car to suddenly start. It was held that plaintiff was properly non-suited.⁴

¹ *South Side Passenger Ry. v. Trich*, 117 Pa. 390 (1887).

² *Picard v. Ridge Avenue Passenger Railway*, 147 Pa. 195 (1892).

³ *Picard v. Ridge Avenue Passenger Railway*, 147 Pa. 195 (1892).

⁴ *Stager v. Ridge Ave. Pass. Ry.*, 119 Pa. 70 (1888).

Riding on Platform.

463. It is not contributory negligence *per se* for a passenger to ride on the step on the front platform of a crowded street railway car, with the consent of the conductor or driver. "It is well known that the highest speed of a horse railroad car is very moderate, and the driver easily controls it, and stops the car by means of his voice, his reins, and his brake. In turning around an angle, from one street to another, passengers are not to expect that he will drive at a rapid rate, but, on the contrary, might reasonably expect a careful driver to slacken his speed. The seats inside are not the only places where the managers expect passengers to remain; but it is notorious that they stop habitually to receive passengers to stand inside, till the car is full, and then to stand on the platforms till they are full, and continue to stop and receive them, even after there is no place to stand except on the steps of the platform. Neither the officers of these corporations, nor the managers of the cars, nor the traveling public seem to regard this practice as hazardous; nor does experience, thus far, seem to require that it should be restrained on account of its danger."¹

It is not contributory negligence to ride upon the rear platform of a street car. In a case where plaintiff was injured while standing on the rear platform of a street car by the pole of a following car, TRUNKEY, J., said: "The large number of passengers in this city who voluntarily stand on the platform, because there is neither sitting nor standing room in the cars, do not, and ought not, anticipate that they will be run over by following cars. Their position has no tendency to induce the driv-

¹ Germantown Pass. Ry. v. Walling, 97 Pa. 55 (1881); Walling v. Railway Co., 12 Phila. 309 (1878).

ing of one car into another. Whatever the degree of their negligence in riding on the platform, and the risk they take in so doing, every one knows that so long as he remains there, he is in no danger of being run down by a car, unless from its heedless handling. When plaintiff was struck, his post was a condition, but not a cause of his injury. It neither lessened the speed of the car he was on nor decreased that of the other; his presence was not a cause of the broken chain and reckless driving of car 14; his place was an incident of an overcrowded car, whose conductor had left the platform to give him standing room, and had not pointed him to a seat or requested him to enter the car."¹

Where a passenger is permitted to ride on the platform of a crowded street car a greater degree of care and vigilance must be observed by the carrier, and in the case of a passenger who is obviously incapable of taking care of himself, either from extreme youth or other cause, the conductor is bound to exercise the highest degree of care for the passenger's safety consistent with the discharge of his ordinary duties.²

In an action against a street passenger railway for negligently overcrowding the car on which the plaintiff was a passenger, so that he was pushed from the platform and injured, where the evidence shows that, although the car was crowded, the plaintiff was alone on the platform and the door was shut, and that the plaintiff was pushed from the platform by passengers leaving the car, but there is no evidence that the passengers were disorderly, the plaintiff is not entitled to recover.³

A boy under the age of fourteen stood on the lower

¹ Thirteenth & Fifteenth Streets Pass. Ry. v. Boudrou, 92 Pa. 475 (1880).

² Sanford v. Hestonville & Fairmount Passenger R. R., 136 Pa. 84 (1890).

³ Randall v. Frankford & Southwark Passenger Railway Co., 8 Pa. C. C. R. 277 (1890).

step of the front platform of a crowded street car as a passenger, and rode for over twenty squares, holding on with one hand. The front platform was without gates or fenders. The boy was finally knocked off by the jolting of the car, and run over. It was held that the question of the company's negligence and the boy's contributory negligence was for the jury.¹

A boy over fourteen years of age stood upon the platform of a crowded street car, having his foot upon the step and leaning back against the dasher, opposite a companion in the same position with respect to the platform, but leaning against the front of the car. When the car reached a transfer station the closed door to the front platform was opened, and the passengers rushed out upon the platform and pushed the plaintiff, so that he fell and was thrown beneath the wheels and his leg crushed. The court charged the jury that the defendant company was not liable for the conduct of the passengers, unless it could have been prevented by the company's employees. The court also submitted the question of the contributory negligence of the plaintiff to the jury. A judgment for the defendant was affirmed on appeal.²

A passenger hailed a street car which stopped. The rear platform being crowded, he went to the front platform, which was also crowded, but succeeded in standing on the lower step, on which there were already two persons, by holding to the hand-rails of the side. In turning a curve the other passengers pushed against the deceased, and he fell off and under a wheel, and was killed. The court held that the question of contributory negligence was for the jury.³

¹ West Phila. Pass. Ry. v. Gallagher, 108 Pa. 524 (1885).

² Randall v. Frankford, Southwark & Philadelphia City Passenger R. R., 139 Pa. 464 (1891).

³ Germantown Pass. Ry. v. Walling, 97 Pa. 55 (1881).

Plaintiff boarded a street car about eighteen or twenty feet from a point where there was a post standing near the car track, with which he was familiar. He remained on the step, and was struck by the post. The evidence as to whether the platform was crowded was conflicting. Held, that plaintiff was guilty of contributory negligence.¹

A boy thirteen years of age got upon the front platform of a crowded street car with the knowledge of the conductor, and took his seat upon the step in such a position that he was struck on his projecting knees by a mortar-box in the street, and was thrown under the car and was injured. It was held that a compulsory nonsuit was properly entered.²

It cannot be said as a matter of law that the absence of the guard or fender from the front platform of a street car is negligence on the part of the company, although the absence of such a guard or fender may be taken into consideration by the jury with the other circumstances of the case in determining the question of the company's negligence.³

Alighting from Car.

464. A person who jumps from a street car while in motion is guilty of contributory negligence.⁴

A boy eleven years of age, a passenger on a street car, upon reaching his destination went quickly to the front platform, and without asking the conductor or driver to stop jumped off with his back to the horses while the car

¹ *Aikin v. Frankford & Southwark City Pass. R. R.*, 142 Pa. 47 (1891).

² *Butler v. Pittsburgh & Birmingham Passenger Ry.*, 139 Pa. 195 (1891).

³ *West Philadelphia Pass. Ry. v. Gallagher*, 108 Pa. 524 (1885); *Hestonville Pass. Ry. Co. v. Connell*, 88 Pa. 520 (1879).

⁴ *Hagan v. Philadelphia & Gray's Ferry Ry.*, 15 Phila. 278 (1881).

was in motion. It was held that he was guilty of contributory negligence, and could not recover.¹

Plaintiff stepped from the front platform of a moving street car, with his back toward the horses, retaining his hold on the dashboard. The forward movement of the car pulled him backward, and he was thrown off and injured. A non-suit was sustained.²

If a company permits a passenger to remain standing on a platform in such a position as to deprive another passenger of a reasonable support in alighting the question of the company's negligence should be submitted to the jury.³

Plaintiff was injured while alighting from a street car. She testified that when she got out of the car she was carrying her child on her left arm. She tried to get hold of the dasher with the other hand, but could not do so, as a passenger standing on the platform was leaning against it. There were two passengers on the platform, one on each side of the conductor, and some four or five passengers in the inside of the car. In getting down plaintiff's foot slipped on the step by reason of ice thereon, and she fell and was injured. It appeared that there had been a storm on the previous day but none on the day of the accident. It was alleged that the ice had been suffered to remain on the step from the previous day. It was there when plaintiff got on the car, as she had slipped in getting on. It was held that the evidence was sufficient to send the case to the jury.⁴

Plaintiff, a boy ten years of age, was a passenger on the defendant's street car, and, in getting off, jumped from the front platform while the car was in motion, and re-

¹ *Purtell v. Ridge Ave. Ry.*, 3 Pa. C. C. R. 273 (1887).

² *Beattie v. Citizens' Pass. Ry.*, 1 Atl. Rep. 574 (1885).

³ *Neslie v. Second & Third Streets Passenger Ry.*, 113 Pa. 300 (1886).

⁴ *Neslie v. Second & Third Streets Passenger Ry.*, 113 Pa. 300 (1886).

ceived an injury which resulted in the loss of a leg. At the time of the accident there were more passengers in the car than could be seated. Some were standing on the front and rear platforms, and others inside the car, in the passage-way between the seats. The plaintiff got into the car in company with his younger brother and sister, at or near the intersection of Walnut and Broad Streets. The latter, upon entering the car, got seats near the door at the rear platform. The plaintiff, after standing awhile, obtained a seat at the upper end of the car, near the front door, which was open. The car stopped at Twenty-first Street, and the younger children, without the knowledge of the plaintiff, got off with other passengers. But as the car started he saw them on the sidewalk, and tried to get out to the rear platform, but the passage-way was so crowded that he turned and rushed out of the front door, and, as he says, told the driver to stop, who answered, "all right," and slacked up with the reins. While the car was in motion, the plaintiff jumped off upon a pile of loose bricks, and slipped under the car. It was held that it was proper to leave both the question of defendant's negligence and plaintiff's contributory negligence to the jury.¹

A railroad company is negligent if it does not cause its cars to come to a full stop, to permit a passenger to get off.²

The implied contract to carry safely includes the duty to give the passenger a reasonable opportunity to alight in safety from the car.³

Plaintiff was injured while attempting to alight from the back platform of a street car. He testified that he

¹ Phila. City Pass. Ry. v. Hassard, 75 Pa. 367 (1874).

² Crissey v. Hestonville, Mantua & Fairmount Pass. Ry., 75 Pa. 83 (1874).

³ Fairmount & Arch Street Pass. Ry. Co. v. Stutler, 54 Pa. 375 (1867).

asked the conductor to stop and leave him off at a certain street; that the conductor rang the bell and the car slowed up; that plaintiff stepped down on the lower step, holding his dinner bucket in his right hand, and taking hold of the car handle with his left; that the car did not stop; and just as plaintiff was about to step to the ground the car started ahead at full speed; that plaintiff held on a little bit, and then swung around and fell up alongside of the car, and dislocated his shoulder. It was held that the case was for the jury.¹

Plaintiff was a passenger upon a summer car on a street railway. The seats ran across the entire width of the car with spaces or aisles between them. When plaintiff went to alight he arose from his seat while the car was in motion, and as he did so, stumbled over the sheathing of a wheel which entered above the floor, but left ample room to enter and leave the car. There was no evidence of any different or more improved construction being used in this kind of a car. It was held that the plaintiff was not entitled to recover damages for his injuries.²

A passenger having a heavy parcel on the front platform of a street car was requested by the conductor to get over the immovable guard of the platform so as to receive the parcel as it would be handed to him. As he was getting over the guard, the car started and plaintiff was thrown and injured. It was held plaintiff was not justified by the instructions in doing that which was in itself negligent.³

Plaintiff got out on the north side of a cable car where he was in safety. If he had looked to the right he could have seen the south track, from which alone danger was

¹ *Linch v. Pittsburgh Traction Co.*, 153 Pa. 102 (1893).

² *Farley v. Philadelphia Traction Co.*, 132 Pa. 58 (1890).

³ *Reilly v. Green & Coates St. Passenger Ry.*, 4 W. N. C. 273 (1877).

to be apprehended, for a square or more to the west, except for a moderate space nearest to him where the car out of which he had just got obstructed his vision. If he had waited a moment for the car to move on again he would have had an unobstructed view of this space. He neither looked nor waited, but turning sharply around the rear of the car started to cross the street and was struck by another car. The space between two sets of tracks was four and a half feet, and the overhang of the cars rather less than a foot on each side, still leaving room enough to stand in complete safety. It was held that the plaintiff could not recover.¹

Duty to Hold on to Strap.

465. A woman in a crowded car is bound to hold on to the straps suspended from the roof of the car, if, with ordinary convenience she can do so.

A woman about thirty years of age entered a crowded railway car of the company defendant, at Tenth and Market Streets. She was compelled to stand in the passage-way of the car, and for protection held on to the hands of a friend who was seated immediately in front of her. When the car approached Front Street it was so carelessly driven against the bumper at the end of the track that the plaintiff was thrown on her face on the floor of the car, and her knee fractured, the result of which was an inability afterward to straighten the limb, and consequently permanent serious lameness. The jury were instructed that when plaintiff entered the crowded car and consented to stand, she assumed all the risks naturally incident to that mode of travel; that she was bound to use all guards and appliances furnished for the protection of passengers, if she could reasonably do

¹ *Buzby v. Philadelphia Traction Co.*, 126 Pa. 559 (1889).

so ; that if, with ordinary convenience, she could reach the straps and hold on to the same, she was bound to do so. A verdict for \$5,500 was sustained.¹

Sitting with Arm Out of Window.

466. Where a passenger sits with his arm resting on the window-sill wholly within the car, and by a jolt of the car in passing around a curve, his arm is thrown out and injured by a car of the same company on the other track, the passenger is not guilty of contributory negligence *per se*.²

If a passenger is injured by the act of a third party over whom the carrier has no control, the burden of proof is upon the passenger to show that the carrier was in some way negligent. Thus if a person sitting near an open window in a street car with his arm resting on the window edge, and a wagon load of hay passing along the street drags his arm out of the window and crushes it, the burden of proof is upon the passenger to show that the railroad company was negligent, and that he himself was not guilty of contributory negligence.³

Injuries to Children—Wanton Conduct of Driver or Conductor.

467. A street railway company is liable for an injury caused by the willful and wanton conduct of an employee acting within the scope of his authority. Thus where a car driver willfully strikes a boy apparently a trespasser knocking him off the car, and then negligently drives the car over him, the company is liable.⁴

A boy twelve years of age got on the front step of a

¹ Whipple v. West Philadelphia Passenger Ry., 11 Phila. 345 (1876).

² Germantown Pass. Ry. v. Brophy, 105 Pa. 38 (1884).

³ Federal Street & Pleasant Valley Ry. v. Gibson, 96 Pa. 83 (1881).

⁴ Pittsburgh, Allegheny & Manchester Pass. Ry. v. Donahue, 70 Pa. 119 (1871); Orbann v. Philadelphia Traction Co., 119 Pa. 37 (1888).

street car which was being driven by another boy while the driver was inside collecting fares. The driver warned the boy off several times, and then came out of the car, and, while it was in motion, pushed the boy who was driving off the car, whereupon the other boy, in attempting to get off, fell under the wheels and was killed. The court charged that if an ordinarily careful driver would have stopped the car, it was negligence of the driver not to stop, and the plaintiff could recover. It was held that this was not error. The court said: "While it was the duty of the driver to put the boys off, using a reasonable amount of force, if necessary, yet he was not justified in putting them off by force, or compelling them to jump off, while the car was in motion." The case differs from *Cawley v. The Railroad Company*, 93 Pa. 498.¹

A boy eight years old was riding upon the front platform of a street car. While there, a dispute arose between him and the conductor about a transfer ticket. There was evidence that the conductor approached the boy in a manner calculated to frighten him, and that the boy jumped off the car by reason thereof, and was injured. It was held that the case was for the jury.²

It is negligence for the driver of a street car to compel a child twelve years old to jump from the platform of a car while in motion, and the child, if injured, may recover damages from the company, although he was on the car as a trespasser.³

Permitting Child to Ride on Platform.

468. It is negligence for a street-car conductor to allow a child five years old to ride on the front platform of a street car.

¹ *Hestonville & Fairmount Passenger R. R. v. Biddle*, 1 Mona. 553 (1889).

² *Sandford v. Hestonville, Mantua & Fairmount Pass. Ry.*, 153 Pa. 300 (1893). See s. c., 136 Pa. 84 (1890).

³ *Biddle v. Hestonville, Mantua & Fairmount Pass. Ry.*, 112 Pa. 551 (1886).

A child five years old, with a companion eleven years old, got on the front platform of a street railway car, and were allowed to ride there by the permission of the driver. When they approached their home, one of the children, against the remonstrances of the driver, attempted to get off the car whilst it was in motion, and was injured. It was held that the company was liable.¹

Where a boy thirteen years old is permitted by a driver of a street car to ride on the front platform, and is allowed to jump off while the car is in motion, the question of the company's negligence and boy's contributory negligence are for the jury. A boy of such an age should be held to the exercise of that degree of care and discretion ordinarily to be expected of a child of his age, neither more nor less, and whether he exercised such discretion is for the jury to determine.²

Invitation by Employee.

469. A boy twelve years old signaled the engineer of a dummy engine, drawing passenger cars, to stop. The train did not stop and the boy ran toward it, and in attempting to get on the platform of the middle car his foot slipped and he fell under the wheel, and his leg was crushed. It appeared that a workman who was allowed to act as a brakeman for a free ride on the train in question, had on a previous occasion said to plaintiff that as he was young he should run and jump on the car. This was denied by the plaintiff. It was held that it was error to submit the whole case to the jury upon the question whether any invitation was given by the brakeman.³

A boy between nine and ten years old jumped on the front platform of a street car at the invitation of the

¹ *Pittsburgh, Allegheny & Manchester Pass. Ry. v. Caldwell*, 74 Pa. 421 (1873).

² *Crissey v. Hestonville, Mantua & Fairmount Pass. Ry.*, 75 Pa. 83 (1874).

³ *Cotter v. Frankford & Southwark Ry.*, 15 Phila. 255 (1881).

driver. After driving a square, the driver said: "Johnnie, get off, you rode far enough." The boy said: "I can't unless you stop." The driver said: "No, jump off." At the same time the driver reached out his hand, and either menacing or actually pushing the boy, drove him from the car while it was in motion. It was held that the case was for the jury.¹

Trespassers.

470. Plaintiff, a boy ten years old, was carrying water for Booth & Flynn, contractors, near Hiland Avenue, East Liberty. While standing there, a car of the defendant company passed, and he heard one say, "Hello, Kid, the driver wants you;" whereupon he went over to the car with his bucket of water. Then some man took his bucket and put it on the car, after which the same man took the boy under the arm, and lifted him on the car on the front platform. There were several other persons on the platform at the same time, including two children, who took a drink of water out of the bucket. After he got on the platform, the car moved on fast for about half a square, when it came to a switch which made a jolt, and some man tumbled against or bumped him, and he fell off; the wheel ran over his leg, and injured it so that it had to be amputated. He was repeatedly asked whether he had been asked to get off by the driver before the accident occurred, and he either denied it, or said he did not know. He further stated that the driver saw him when he was taken on the car. This was his statement on the stand. Two witnesses called by the defendant testified that when the boy was taken home, and when he was resting and free from pain, he said in answer to an inquiry by the witness how the accident occurred, that

¹ Hestonville Pass. R. R. v. Grey, 1 Walker, 513 (1876).

it was not the fault of the driver, that it was his own fault; that "he jumped off, and ran against some person, and it threw him under." There was no attempt to contradict this testimony by the plaintiff himself, or by any one else. That this statement, made by the boy almost immediately after the accident, was the true version of the matter, appeared conclusively by the evidence of all the other witnesses who were examined and had any knowledge of the matter, including those of the plaintiff. There was no reliable evidence that the driver knew that the boy was on the car when the accident occurred. It was held that the evidence was insufficient to carry the case to the jury. The court said: "Here a boy of ten years of age—and many boys of that age know more about getting on and off a horse car than men of seventy—was stealing a ride, and had been repeatedly warned off and put off by the driver. He appeared to have done all that could be expected, in view of the crowded condition of his car. He had duties to perform to other passengers, and there is not even a scintilla of evidence that he consented to the boy being on the car. The evidence of the plaintiff amounts at most to a scintilla. He is contradicted by his own witnesses and by himself. To allow him to recover under such circumstances would be a mockery of justice."¹

Plaintiff, a boy, got upon the front platform of a street car while the driver, who was also conductor, was looking after another boy who had got on the rear platform without right. Plaintiff jumped off while the car was in motion, and before the driver saw or knew that he had been there. A non-suit was sustained.²

If a child six years and nine months old suddenly and

¹ *Wrasse v. Citizens' Traction Co.*, 146 Pa. 417 (1892).

² *Clutzbeher v. Union Passenger Ry.*, 1 Atl. Rep. 597 (1885).

unexpectedly attempts to mount the front platform of a street car while the driver, who is also conductor, is on the rear platform, and is injured, the railroad company is not liable. In such a case, where the railway is a suburban one, the failure to place a fender on the front of the car is not negligence, nor was the absence of the conductor from the front platform negligence on the part of the company.¹

Omission to Perform a Duty Suddenly Arising.

471. Where the sole basis of liability is the omission on the part of a railroad employee to perform a duty suddenly and unexpectedly arising, there ought to be at least a consciousness of the facts which raise the duty on the part of the person who is charged with the performance and a reasonable opportunity to discharge it.

As a street railway car moving slowly after dark was approaching a switch, two boys aged respectively ten and seven years of age, approached the car, and the driver permitted the older one to jump upon the platform, take the switch iron, and turn the switch. The other boy, seven years of age, followed his companion on to the front platform; the driver leaned forward over the dasher, looking to see that the switch was right, the car proceeding slowly. While so engaged he did not notice the boy on the platform, but when the car took the switch all right he turned to look for the boy, who had just about that moment jumped off the platform after his hat, which blew off. Immediately afterward a jolt was felt on the car, and it was found that the younger boy in jumping off had in some way fallen under the car and was run over and killed. The deceased was not on the car longer than half a minute, during all which time the driver's attention was directed to passing the switch. It was

¹ *Hestonville Pass. Ry. Co. v. Connell*, 88 Pa. 520 (1879).

held that the case should have been withdrawn from the jury, as there was no proof of negligence on the part of the driver.¹

Evidence of Negligence.

472. If there is testimony on behalf of the plaintiff which alone, if believed, would warrant a jury in inferring negligence on the part of the railroad company the case must be submitted to the jury, no matter how strong or persuasive be the countervailing proof.

In an action against a street passenger railway company to recover damages for an injury caused by a car running over a child four years old a witness for the plaintiff testified that the street was clear of wagons, that the driver of the car was not looking ahead, but was talking with passengers riding on the front platform, and that the brake of the car was not in order. There was strong and persuasive evidence on behalf of the company that immediately before the accident a large wagon approached the car on the other track, and at the moment the car horses were opposite the wagon the child ran out from behind the wagon, and was knocked down by one of the car horses and ran over by the car within less time than the car could have possibly been stopped. It was held that the case was for the jury.²

The court cannot say that it was negligence on the part of a driver of a street car not to stop his car when he saw a child in the street approaching the car, and in such close proximity that it might reach the track before the car passed. The standard of duty in such a case is a shifting one, and for the jury.³

¹ *Hestonville, Mantua & Fairmount Ry. v. Kelley*, 102 Pa. 115 (1883).

² *Citizens' Passenger Ry. Co. v. Foxley*, 107 Pa. 537 (1884).

³ *Philadelphia City Pass. Ry. v. Henrice*, 92 Pa. 431 (1880).

Proximate Cause.

473. A boy four years and five months old was run over by a street car. With two other older boys he was playing "tag" upon the street. While they were playing one of defendant's cars, in charge of a driver and without a conductor, came along, going west. Frank, the boy who was injured, ran along in the rear of the car, holding on to the brake. The driver got off of the front platform, went around the car on the north side, and struck the boy with his whip, and, according to the testimony of one of the boys, hit him twice. The boy ran away, and in doing so ran into another car of the defendant going east upon the other track, the hind wheel of which went over his leg, causing his death. It was held that the act of the driver was not the proximate cause of the injury, and that the company was not liable.¹

Contributory Negligence of Parents.

474. If parents permit a child of tender years to run at large without a protector in a city traversed constantly by cars and other vehicles, they fail in the performance of their duties, and are guilty of such negligence as precludes them from a recovery of damages for any injury resulting therefrom. If the case is barely such, the negligence is a conclusion of law, and ought not to be submitted to the determination of the jury. But if there is evidence that the parents took some precautions, and that the child escaped from the parents, notwithstanding the precautions, the question of the contributory negligence of the parents is for the jury.

In an action for the death of a child eighteen months old, it appeared that the parents provided a board at the door to prevent the child from leaving the house of his

¹ *Mack v. Lombard & South Streets Pass. Ry.*, 8 Pa. C. C. R. 305 (1890).

own accord; when abroad he was in charge of an older sister between twelve and thirteen years of age. It happened just before the accident occurred that the board was removed temporarily for the purpose of scrubbing the floor. The child watched his opportunity and escaped, and his brother was immediately sent after him. The child, however, ran across defendant's track and was killed. The court held that the case was for the jury.¹

Plaintiff's son, a boy between six and seven years of age, had been in the habit of getting on and off defendant's street cars while they were moving slowly in ascending a hill, for the purpose of selling water to drivers and conductors. While so employed, he fell under the wheels of a car from the front platform, which was without a guard. Plaintiff's occupation compelled her absence from her home during the day, but she knew of her son's occupation, and had not forbidden it, though she had frequently cautioned him to be careful. It was held that a non-suit was properly entered.²

Contributory Negligence not Imputed to Children of Tender Age.

475. A child six years and six months old was run over by one of defendant's street cars. There was evidence that the driver of the car was intoxicated, that he was driving at a rapid rate of speed; and that he was looking sideways and talking to a man on the platform. It appeared that the boy ran out of a store and across the street and was knocked down by the horses of the car. It was held that contributory negligence could not be

¹ Pittsburgh, Allegheny & Manchester Ry. v. Pearson, 72 Pa. 169 (1872).

² Smith v. Hestonville, Mantua & Fairmount Passenger Ry., 92 Pa. 450 (1880); a. c. 13 Phila. (1879).

imputed to the boy on account of his tender age, and that the question of the company's negligence was for the jury.¹

A child four years old was sent alone by her parents to a neighboring store. It was run over by a street car on the north walk of a crossing. The driver had stopped his car at the south walk. He first saw the child under the tongue, when his horses jumped. The evidence was conflicting as to whether he was looking ahead. The case was left to the jury, and a verdict and judgment for the child was sustained.²

Concurrent Negligence of Third Person not Imputed to Child.

476. Where a child of tender years is injured by the negligence of a railroad company, the concurrent negligence of a third person who was not in charge of the child cannot be imputed to the child so as to prevent a recovery against the railroad company.

A child five years old with another eleven years old, who was merely a companion, got on the front platform of a street railway car and with the permission of the driver rode there. In attempting to alight from the car while in motion the younger child was injured. It was held that the conduct of the elder child, which contributed to the injury, could not be imputed to the plaintiff.³

¹ *Lombard & South Streets Passenger Railway Co. v. Steinhart*, 2 Pennypacker, 358 (1882).

² *Erie City Passenger Ry. v. Schuster*, 113 Pa. 412 (1886).

³ *Pittsburgh, Allegheny & Manchester Pass. Ry. v. Caldwell*, 74 Pa. 421 (1873).

CHAPTER XXXVII.

TRAVELING ON SUNDAY.

477. Traveling on Sunday.

479. Operating Street Railway on

478. Repairing Track on Sunday.

Sunday.

Traveling on Sunday.

477. A sale of railroad tickets on Sunday, to be used by the purchaser in traveling by railroad to camp-meeting, is a work of necessity, and, therefore, not a violation of the Sunday law of April 22, 1794, prohibiting worldly employment on Sunday. FURST, P. J., said: "As early as 1819 it was held that traveling on Sunday was not within the act: *Jones v. Hughes*, 5 S. & R. 299; *Logan v. Mathews*, 6 Pa. 417. Was it wrong for those persons to attend camp-meeting on Sunday? It is very true that a class of persons having puritanical ideas are averse to this method of worship. It is too late now to say that camp-meetings are not places of religious worship; it is the favorite meeting-place in the pleasant season of the year of one of the largest and most influential religious bodies in the land. The meetings are conducted in the same manner as if held in church; it is divine worship, and so understood by all Christian people. Clearly, then, these people had a legal right to go to this meeting, and by public conveyance, if they saw fit; and in so doing they themselves were not engaged in any worldly employment. In traveling upon the cars they were simply

traveling upon a public highway. A railway is as much a public highway as a canal, at least; the only difference is in the mode of travel, but both are highways in the legal sense. Was it, therefore, an offense under this statute for the defendant to afford these persons the only means by which they could on that day attend this religious meeting? If it were not an offense for them, how can it be made an offense in the defendant?

"In *Murray v. Com.*, 14 Pa. 270, it was held that a lock-keeper in the employ of the Schuylkill Navigation Co., was not liable to conviction for violating the Act of April 22, 1794, prohibiting employment upon Sunday, for opening the lock-gates on the Schuylkill canal, to admit of the passage of boats on the Sabbath day, on demand of owners or captains of boats navigating the canal. The reason is given in the second branch of the case, which is that the Schuylkill River is a public highway, and as people have a right for some purposes to pass along it, even on Sunday, the company must keep it open; and the agents of the company are not to judge as to the lawfulness of the travel, which is done at the risk of incurring the penalty prescribed for the violation of Sunday, inflicted in the mode prescribed by law. Traveling is not within the prohibition of the act, and works of necessity and charity are excepted.

"These persons having the legal right to go in the manner they did to this meeting, the employment of the defendant was of such a character, and made his act a necessity to the exercise of them, or the employment of a right which they possessed; it thereby became a work of necessity within the meaning of the exception in the act. By a work of necessity is not meant by the statute a physical and absolute necessity; but any labor or work which is morally fit or proper to be done on that

day under the circumstances of the particular case : *Flagg v. Millbury*, 4 Cushing, 243. The principle of these cases seems to us to rule this question in favor of the defendant."¹

Repairing Track on Sunday.

478. Where a rail is discovered to be broken on a Sunday morning, the employees of a railroad company may repair it without violating the Sunday law of 1794.²

Operating Street Railway on Sunday.

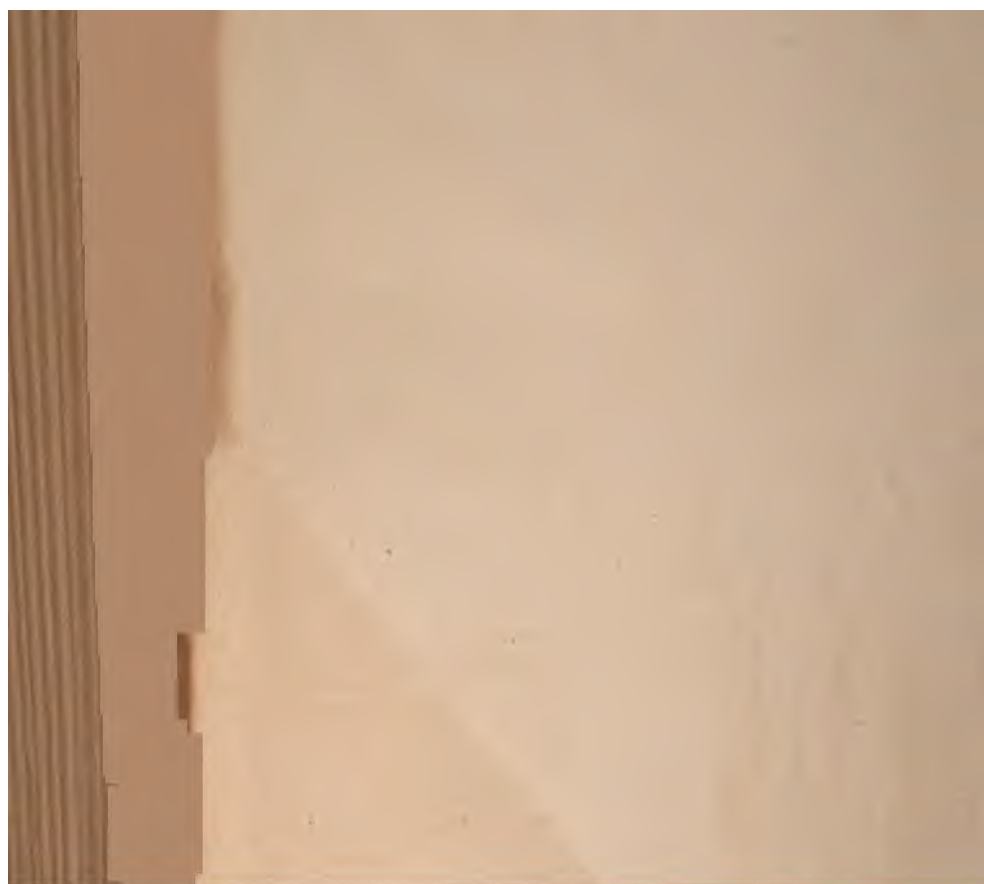
479. Although the running of street cars on Sunday is a worldly employment in violation of the Act of 1794, a court of equity cannot interfere by injunction to restrain the railroad company from thus running its cars.³

¹ *Commonwealth v. Fuller*, 4 Pa. C. C. R. 429 (1887).

² *Commonwealth v. Fields*, 4 Pa. C. C. R. 434 (1887).

³ *Sparhawk v. Union Pass. Ry. Co.*, 54 Pa. 401 (1867); *Johnston v. Com.*, 22 Pa. 103; *Com. v. Jeandell*, 2 Grant, 510.





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